STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc.	)	
	)	ICC Docket No. 98-0555
Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc. in Accordance with Section 7-204 of the Public Utilities Act and for All Other Appropriate Relief	)	

AT&T BRIEF ON EXCEPTIONS (REOPENING)

August 17, 1999

AT&T Communications of Illinois, Inc. ("AT&T"), by its attorneys, hereby submits its Brief on Exceptions to the Hearing Examiners' Proposed Order On Reopening ("Proposed Order" or "HEPOR") of August 10, 1999, pursuant to Section 200.830 of the Commission's Rules of Practice.

INTRODUCTION

This Proposed Order is the result of the Commission's questions on reopening, and consequently it focuses almost entirely on the conditions that Joint Applicants have proposed as the basis for approval of their merger. Underlying those questions, however, are the serious concerns expressed by members of the Commission over the effects the proposed merger will have on the local exchange market and competition in Illinois. The record on reopening has served to heighten, not lessen, concerns on that core substantive issue. It remains apparent that no conditions (at least no post-merger conditions) could be created that would be adequate to assuage competitive concerns over a monopoly merger of this scope. The "commitments" that Joint Applicants have put forward in this case with respect to competitive issues are entirely insubstantial, inadequate, and as a practical matter largely unenforceable.

If notwithstanding the deep and widespread opposition to this merger the Commission is nevertheless inclined to approve the merger with conditions, it must engage in a painstaking analysis of the proposed commitments of the Joint Applicants. Once the merger is approved the Commission, the public parties that have opposed this merger and the CLECs will be left only with litigation as a means of enforcement. These conditions have been carefully crafted by Joint Applicants to give the impression of substance (certainly they are lengthy), but as shown in AT&T's Initial Brief On

Reopening and the briefs of other Intervenors, the commitments are vague, insubstantial, and ultimately unenforceable as to be ineffective on the issue of competition. In fact, in crucial respects they are in conflict with this Commission's prior orders in the Wholesale/Platform and TELRIC cases and would actually *harm* the development of local competition. Accepting Joint Applicants' proposed conditions without modification would *guarantee* that the anticompetitive effects of the merger will not be remedied.

Regrettably, the HEPOR represents wholesale acceptance of Joint Applicants' offering. Certainly Joint Applicants in their exceptions will make much of the merger savings provision, or of the requirement that they make arbitrated (as well as agreed-to) interconnection arrangements available to CLECs in Illinois, but otherwise they have little to which they can even take exception. Because this is in fact their "package deal." The HEPOR by and large accepts Joint Applicants' proposed conditions, and accepts them at face value. Time and again the HEPOR, having summarized the case against a particular condition, proceeds simply to ignore all opposing contentions and accept Joint Applicants' position, in conclusory fashion (and consistently using boilerplate language furnished by Joint Applicants in their proposed order). The result is a proposed order whose conclusions are arbitrary and unsupported by the record.

AT&T adheres to the position that the better course is to reject the merger and not subject Illinois consumers and CLECs to the risk to competition that this merger, no matter how heavily conditioned, would entail. Joint Applicants' handling of the conditions issues evidences a lack of respect for the Commission and a proclivity for manipulating the regulatory process that bodes ill for the future if this merger goes forward. If the Commission is nevertheless decided upon approving the application

conditionally, it should give the proposals of Joint Applicants the kind of rigorous scrutiny they warrant. In that connection, without attempting to re-write it comprehensively AT&T recommends a number of modifications to the Proposed Order on important issues. In reviewing these proposals and those of the other Intervenors, the Commission should bear in mind that under Section 7-204(c) of the PUA it has full discretion to order such conditions as are necessary to protect the public interest and that while the HEPOR has confined itself almost exclusively to the conditions as proposed (and as phrased) by Joint Applicants, the Commission is not so constrained.

EXCEPTIONS

I. ACTUAL POTENTIAL COMPETITION

The HEPOR fails to address the most salient fact with respect to the actual potential competition issue: Mr. Kahan admitted that Joint Applicants offered *nothing new* on this issue on reopening.[1] If the Commission was not satisfied with Joint Applicants' evidence and argument on this issue in the main phase of the case, and *no* new evidence or argument has been submitted, it cannot now be satisfied.

Moreover, the HEPOR's potential competition analysis exhibits many of the same flaws contained in the original HEPO. Specifically, the HEPOR relies too much on the DOJ Merger Guidelines; misconstrues the burden of proof; improperly disregards evidence as speculative; uses the wrong test to measure the deconcentrating effect of SBC entry into Illinois; misreads the deconcentrating effect evidence; and incorrectly analyzes the number of other potential competitors and whether they are similarly situated to SBC. AT&T previously addressed these issues in the initial phase of this docket in its Reply Brief (pp. 21-22), Proposed Order (pp. 17-18), Brief on Exceptions

[1] Tr. at 1848; AT&T Initial Reopen Br. at 17.

(pp. 13-19) and Reply Brief on Exceptions (pp. 8-14). Therefore, AT&T does not reiterate its previous treatment of these issues here, but instead summarizes its analysis of the potential competition issues.

First, the actual potential competition doctrine is not the primary test. As AT&T and others have maintained throughout this case, a proper application of Section 7-204(b)(6) requires the Commission to compare the expected state of competition in the local exchange market with and without the merger. The HEPOR correctly states that the Merger Guidelines are a "starting point," not entitled to "conclusive effect," and do not "limit" the Commission's competition analysis.[2] However, the HEPOR then proceeds to use the Merger Guidelines as a limiting, conclusive, end point.[3]

Second, the HEPOR mischaracterizes the burden of proof on the competition issue. Although Joint Applicants have the burden of proof in this proceeding, the HEPOR states that there is "*no conclusive evidence* to show that the proposed merger will inhibit the ability of competitive carriers to enter the market and to increase their supply of the goods."[4] This is misguided because Staff and Intervenors do not have the burden to show affirmatively, much less by "conclusive evidence" that the merger will impair competitive entry. Joint Applicants, on the other hand, *are* required to proffer such evidence and did not. It follows that Joint Applicants should lose on this basis alone.

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[2] HEPOR at 28.

[3] For example, the HEPOR references "the key question of whether SBC is an actual potential competitor in Illinois." HEPOR at 28. However, the "key" question is whether the merger will have a substantial adverse impact on competition – i.e., what effect will the merger have on the future state of local competition in Illinois.

[4] HEPOR at 29 (emphasis supplied).

Third, the HEPOR states Staff's and Intervenor's arguments that the merger will increase barriers to entry into the local exchange market are "based only on speculation not evidence."[5] If that is the standard, however, one could never prove that an entity was an actual potential competitor.[6]

Fourth, the HEPOR incorrectly assesses the impact of an independent entry into Illinois markets by SBC.[7] Again, the burden of proof is wrongly allocated to merger. The HEPOR wrongly concludes that Staff and Intervenors have failed to provide "evidence that SBC would have more of an impact on the Illinois local exchange market . . ." and have failed to show that SBC "would not do what some other carriers are doing . . . with no impact on the provision of local exchange services . . . ."[8] Again, Joint Applicants have the burden, they did not proffer any evidence (the HEPOR cites none), and the "deconcentrating effect" prong of the actual potential competition test is not met.

Fifth, the HEPOR states the deconcentrating effect test inaccurately by asserting that it is unlikely that SBC will be able "single-handedly" to deconcentrate the Illinois local exchange market."[9] However, the standard is not whether SBC can deconcentrate

[5] HEPOR at 29.

[6] The question – If SBC and Ameritech merge, will market barriers increase? – requires a determination of the likelihood of a future event. Courts and commissions make such determinations every day. To say that an informed judgment about a future event is "speculation not evidence" renders the test meaningless.

[7] HEPOR at 30-31.

[8] HEPOR at 30.

[9] HEPOR at 31.

the Illinois local exchange market by itself, it is whether entry by SBC tends to "shake things up."[10]

Sixth, even if one disregards the improper burden of proof shifting and the incorrect formulation of the test, Joint Applicants still fail the deconcentrating effect test. The HEPOR incorrectly states that there is "no evidence" that SBC would have more of an impact in Illinois than other carriers.[11] Mr. Kahan testified extensively as to how significant an impact SBC would have out of region by virtue of its National-Local strategy.[12] In addition, the FCC has concluded that the deconcentration test is easily satisfied when the entering firm is an RBOC because, contrary to the HEPOR's assertions,[13] there are significant differences between IXCs and RBOCs: An RBOC "possesses unique advantages not possessed by other market participants. Unlike AT&T or MCI, [an RBOC] has substantial experience serving mass market customers of local exchange and exchange access services."[14]

Finally, the HEPOR's analysis of other potential competitors is erroneous. There is no "magic" number of competitors that cuts off the competitive benefits of entry by

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[10] *BOC Int'l, Ltd. v. Federal Trade Comm'n,* 557 F. 2d 24, 27 (2d Cir. 1977) (citation omitted). This standard is easily met in highly concentrated markets such as the Illinois local exchange market: "typically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects." *Id.* (*citing Ford Motor Co. v. United States,* 405 U.S. 562, 587 (1972) (Burger, C.J., concurring and dissenting); *see also Yamaha Motor Co. v. Federal Trade Comm'n,* 657 F.2d 971 (8th Cir. 1981).

[11] HEPOR at 30.

[12] Kahan Direct at 9-10 (SBC/Ameritech Ex . 1.0); Kahan Rebuttal at 23, 48 (SBC/Ameritech Ex. 1.1).

[13] HEPOR at 30.

[14] BA/Nynex Order ¶ 107. In the BA/Nynex case, the FCC concluded that Bell Atlantic's entry would have had a deconcentrating effect. *Id.* ¶ 139.

SBC.[15] Moreover, the HEPOR lists Bell Atlantic, Bell South and US West as potential competitors.[16] However, Joint Applicants have previously contended that these RBOCs cannot be considered potential competitors: "non-adjacent, out of-region RBOCs that have no useable brand name recognition in the target markets and no local exchange facilities and no customer base are not 'significant market entrants' and thus are not 'potential competitors' as those terms are commonly understood."[17] Moreover, before counting AT&T and MCI as *potential* competitors, the Commission must remember that AT&T and MCI are *already* in the Illinois local exchange market. Despite their efforts, the Illinois local exchange market, as the HEPOR notes, remains "significantly concentrated."[18] Therefore, it cannot plausibly be argued that the presence of AT&T and MCI mitigates the absence of SBC as a competitor. Accordingly:

AT&T Exception No. 1:

AT&T Excepts to the analysis and conclusions and the findings reached in the Proposed Order on the issue of actual potential competition, on the grounds that they are arbitrary, rest on an improper legal standard, and are not supported by the record, and proposes the following modifications to the text on this issue:

1. The competition language on page 29 of the HEPOR should be modified as follows:

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[15] 5 P. Areeda & D. Turner, *Antitrust Law* § 1123b at 124 (1980); *see also* Cross Ex. 35, Department of Justice Merger Guidelines § 0 at 2 (Apr. 8, 1997 ed.) ("mechanical applications of [the Guidelines] may provide misleading answers" and Guidelines are not substitute for "exercise of judgment").

[16] HEPOR at 31.

[17] Joint Applicant Initial Br. at 60.

[18] HEPOR at 29-30.

We recognize the general concept that competition only develops when competitive firms are able to enter a market and expand the supply of good that is being provided. In these premises, Ameritech Illinois' dominant market share must be eroded by the entry of competitive carriers and an expansion of their supply of goods. We agree with Staff and the majority of Intervenors who argued that a merger of two RBOCs raises a presumption of anticompetition in the form of increased barriers to entry and barriers to transitioning the local exchange market to competition. Joint Applicants, who carry the burden of proof, offered no conclusive evidence to show that the proposed merger will not inhibit the ability of competitive carriers to enter the market and to increase their supply of the goods nor did they show that the merger will not have a negative effect on efforts to open the local exchange market to competition.

We ~~also do not~~ believe that the proposed merger will increase the market's barriers to entry preventing competitive carriers from entering or expanding the supply of the goods. ~~It has been argued that the~~ It is likely that these barriers to entry will increase in a number of ways, including increasing the level of disparity between the information held by Ameritech Illinois and CLECs, decreasing the amount of information available to consumers about alternative providers to Ameritech Illinois, and resale and UNE prices, increasing resistance to the implementation of our pro-competitive policies, creating an opening for the adoption of anticompetitive practices within Illinois under the guise of best practices, and increasing the company's incentive and ability to discriminate. We disagree with Joint Applicants' claim that evidence of these barriers to entry was speculative. The PUA requires us to make a determination regarding the future effects of the merger. Courts and agencies make such determinations regularly. We do so here after a year of discovery, testimony, hearings and briefing. This is not speculation; it is an informed judgment as to what effect this merger will have on local competition. ~~This, however, is based only on speculation not evidence.~~ Finally, Joint Applicants' argument ~~It also fails to account for the fact~~ that Ameritech will continue to be subject to our jurisdiction and to all the dictates of the Act and our rules is true but irrelevant. If that were the standard, there would be no need for a merger review process and Section 7-204 would be rendered meaningless.

2. The competition language on pages 30-31 of the HEPOR should be modified as follows:

As to the doctrine's fourth element, we find that the impact from SBC's likely independent entry into Illinois' local exchange market would be significant. Joint Applicants' witnesses, particularly Mr. Kahan, testified in great detail regarding the impact of their National-Local strategy. Joint Applicants claim that the National-Local strategy is unprecedented in scale and scope. They also assert that they will take enough out-of-region market share to trigger retaliatory entry by other RBOCs and by IXCs. Thus, by its own logic, SBC's likely entry into

Illinois would have a significant impact on our local exchange markets. It is implausible for SBC to claim otherwise. It cannot claim that its out-of-region entry will be significant and simultaneously assert that if it entered Illinois independently, that entry would not be significant. ~~When we examine the various parties assertions, they invariably suggest that SBC's entry would be limited in scope and geared to capture large business customers. While even such entry may benefit competitors, it does not benefit, and may even harm small business and residential customers.~~ We agree with ~~At the very least,~~ Staff that SBC's entry would shake up the market and engender competitive motion which would be a significant impact, in light of the fact that the market has seen little competitive movement since deregulatory efforts began. ~~We note, however, that Staff does not apply the same reasoning with respect to AT&Ts recent local competitive strategy.~~

We disagree with ~~There is no evidence that~~ SBC's claim that it would have no more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCIW, and Sprint. ~~, all of which have significant technical and capital resources, ILEC experience, and national brand names~~ We concur with the FCC that RBOCs are fundamentally different than the IXCs when it comes to local exchange operations. As the FCC held in the BA/Nynex case: An RBOC "possesses unique advantages not possessed by other market participants. Unlike AT&T or MCI, [an RBOC] has substantial experience serving mass market customers of local exchange and exchange access services." (BA/Nynex Order ¶ 107.) ~~In other words, the same factors which are ascribed to SBC apply to these entities as well. Even if SBC were to enter the Illinois local exchange market, there is no evidence that it would not do what some other carriers are doing, which is to pursue large business customers only, with no impact on the provision of local exchange services to residential and small business customers. This would not amount to significant entry in our view.~~ The fact that SBC may pursue large business customers at the outset is irrelevant to our analysis. It is clear that business competition is an antecedent to small business and residential competition.

Under the doctrine's fifth element, we must examine whether a sufficient number of alternative likely entrants exists such that the independent entry of SBC is not required.

As mentioned earlier, SBC is ~~not~~ one of only a few potential competitors of Ameritech Illinois. Contrary to Joint Applicants' arguments, there is no set number of competitors that, when exceeded, automatically clears the way for this merger. Joint Applicants claim that Bell Atlantic, Bell South and US West are potential competitors. However, Joint Applicants' own logic trips them up again. If SBC and Ameritech *must* merge to compete nationally, then the other RBOCs must merge too. Thus, unless they merged, Bell South and US West could not compete nationally. Bell Atlantic could only compete if its merger with GTE is approved. In addition, if the RBOCs are to be considered potential competitors, then we believe that SBC is the most likely and most capable competitor of

Ameritech Illinois. Finally, Joint Applicants' have already acknowledged that the other RBOCs are not potential competitors: "non-adjacent, out of-region RBOCs that have no useable brand name recognition in the target markets and no local exchange facilities and no customer base are not 'significant market entrants' and thus are not 'potential competitors' as those terms are commonly understood." Joint Applicant Initial Br. at 60. As for AT&T and MCI, they are already in the Illinois local exchange market. They have had limited success so far. Therefore, we hold that their presence does not mitigate SBC's absence as a competitor. ~~To the contrary, Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth, and US West) after the merger. This number is sufficient and undisputed. (1984 DOJ Merger Guidelines, § 4.133, SBC/Am. Ex. 35.) The argument that certain firms cannot be considered potential entrants because of some current market presence, however small, is not persuasive. The key inquiry is future competitive significance; if AT&T or MCIW have the "potential" to expand their respective market shares in the Illinois local exchange market, then for purposes of this analysis they are both actual competitors and actual potential competitors. See, e.g., In re Heublein, Inc., 96 F.T.C. 385, 590-91 (1980); In re Champion Spark Plug Co., 103 F.T.C. 546, 631 (1984). Indeed, the fact that they already have a toe hold in the market makes them, if anything, even more significant then other potential competitors, that are not currently in the market such as SBC. The presence and visibility of AT&T and MCIW make them the most likely to rapidly capture market share from Ameritech Illinois in the near future.~~

We find Joint Applicants' lengthy discussions of the mergers and business ventures of AT&T, MCIWorldCom and Sprint, and their general discussion of transactions involving (comparatively) unregulated businesses – long distance, wireless, cable, international, data and Internet – to be wholly irrelevant. There is a significant and obvious difference between a merger of two large regulated local exchange companies and these other transactions. ~~Nor can we dismiss AT&T's recent mergers and its stated desire to develop a cable alternative to telephone service. This is evidence of the creative and expansive ways that telecommunications providers are changing the markets. AT&T's cable service, in the next three to five years, could be developed to provide local exchange service on a large scale. We are not persuaded by Staff's attempts to minimize the significance of this venture.~~

In the final analysis, ~~while~~ SBC ~~could~~ would likely enter the local market in the next three to five years, and its entry would likely have a deconcentrating effect. ~~it is improbable that SBC will be able to single-handedly deconcentrate the market or obtain a significant share of the market anymore than other competitors combination with other entrants.~~

II. INTERCONNECTION

The HEPOR, with one exception, adopts the interconnection language from Joint Applicants' proposed order word for word. There are numerous problems with this wholesale adoption of Joint Applicants' position. The HEPOR begins its discussion of the interconnection commitments, for example, by stating that they are "subject to effective enforcement measures."[19] This finding is entirely without basis. Despite their proposed order language, Joint Applicants have expressly acknowledged that there are *no penalties* provided for under the proposed conditions if they fail to comply with their Interconnection Commitments.[20]

The HEPOR further avers that the Interconnection Commitments offer "procompetitive benefits . . . that would not exist absent the merger."[21] To the contrary, today, without these commitments, CLECs can request any UNE, service, facility or interconnection arrangement they desire from Ameritech. The parties negotiate, then (if necessary) arbitrate. But that is what the interconnection commitments provide for. No provisions are automatically imported into Illinois and, therefore, there is no change in the status quo.

The HEPOR asserts that Joint Applicants will "make available in Illinois certain arrangements"[22] and CLECs will have a "much broader group of arrangements to choose

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[19] HEPOR at 50.

[20] Kahan Direct on Reopening at 11 (SBC/Ameritech Ex. 1.3); Tr. at 1865 (Kahan); AT&T Initial Br. at 25.

[21] HEPOR at 50.

[22] HEPOR at 50.

from."[23] To the contrary, Joint Applicants have not identified a single provision that they are willing to make available in Illinois without qualification after the merger. Thus, with or without the commitments, CLECs request an arrangement, negotiate and then arbitrate. Moreover, the commitments do not provide a broader array of arrangements to choose from. Today, without the commitments, CLECs can *choose* any arrangement they want. However, as is the case *with* the commitments, whether CLECs get what they want depends on negotiations and arbitrations.

The HEPOR accepts AT&T's proposal that the in-region interconnection commitment apply to arbitrated as well as voluntarily negotiated provisions.[24] Note, however, that the acceptance of AT&T's proposal must be clarified in Section VI, *Conditions to Approval of the Reorganization,* of the HEPOR.[25] Ameritech must make available in Illinois the interconnection provisions that apply to SBC ILEC affiliates whether by virtue of arbitration or negotiation. This change to Joint Applicants' plan is a step in right direction, but it is only a step. Although they would be bound to make arbitrated provisions available in the same fashion as agreed-to provisions, nothing in the commitment obligates Ameritech actually to offer them automatically. All of Joint Applicants' caveats – technical unfeasibility, pricing, timing, etc. – still apply.

Interconnection Commitment D applies to SBC's out-of-region CLECs. Provisions that the SBC CLEC(s) wins out of region through arbitration or negotiation are eligible for importation into Illinois. Again, CLECs already have the ability to

[23] HEPOR at 51.

[24] HEPOR at 50.

[25] HEPOR at 138-39.

request these arrangements from Ameritech, so this commitment adds little if anything to the status quo. Moreover, the commitment excludes most favored nation ("MFN") provisions.[26] Joint Applicants never offered a good reason why MFN provisions are excluded and neither does the HEPOR.[27]

In its Initial Brief, AT&T pointed out the astounding number of exceptions to the Interconnection Commitments.[28] The HEPOR concludes, without explanation, that these limitations and caveats are appropriate.[29] If the exceptions are allowed, the parties are at least entitled to an explanation of what they mean. For example, "similarly situated" CLEC means the CLEC "is seeking to obtain interconnection agreements containing the same volume, term and area of service commitments."[30] There is no explanation in the record as to what that means. Accordingly:

[26] HEPOR at 51.

[27] HEPOR at 51.

[28] AT&T Initial Reopening Br. at 19-32.

[29] HEPOR at 50.

[30] HEPOR at 142.

AT&T Exception No. 2:

AT&T exceptions to the analysis and conclusions and to the findings reached in the Proposed Order on the interconnection commitment, on the grounds that they are arbitrary and unsupported by the record, and recommends that the text be modified as follows:

1. The language on pages 50-51 of the HEPOR should be modified as follows:

> We conclude that Joint Applicants' proposed interconnection commitment is not responsive to our questions. The commitment is essentially a restatement of the status quo. Under the commitment, CLECs can request, then negotiate and then arbitrate interconnection arrangements. That is no different than the scenario today without the commitment. Thus, it does not afford any procompetitive benefits that would not exist absent the merger. Moreover, the interconnection is riddled with exceptions that rob it of any effectiveness. Finally, the commitment is not subject to any enforcement measures.
>
> As a starting point, we agree with Joint Applicants that TA96 does not require an incumbent LEC to offer "most favored nation" treatment to CLECs based on interconnection agreements that the incumbent LEC or its affiliate may have in other states. Thus, Joint Applicants' agreement to give CLECs such "most favored nation" treatment with respect to arrangements that SBC has negotiated or arbitrated in other states *could be* ~~is~~ a substantial step beyond current legal requirements. For instance, if Joint Applicants had presented a list of interconnection provisions not currently offered in Illinois that they would make available automatically – i.e., without negotiations and arbitration -- after the merger, there might be some procompetitive benefit to this commitment. Likewise, if Joint Applicants had offered interim pricing, there might be a procompetitive benefit. For example, if Joint Applicants agreed to make the UNE-Platform automatically available and offered the interim prices for the port, switching and shared transport set forth in the Commission's TELRIC Order, one might conclude that the commitment was procompetitive. In addition, if the commitment was designed to streamline negotiations and avoid arbitration, there would probably be a procompetitive benefit. Unfortunately, this commitment has none of those features. ~~It therefore represents a procompetitive benefit to Illinois that would not exist without the merger, because it allows CLECs to opt into a potentially much broader range of arrangements than previously was available. In addition, Joint Applicants have committed to make available in Illinois certain arrangements that they are able to obtain in their role as a CLEC. This, too, goes well beyond any current legal requirement and represents a procompetitive benefit for Illinois that would not otherwise exist.~~

Certain parties have criticized Joint Applicants' commitment as being vague or illusory. We concur. Except for pricing, Joint Applicants' limitations and exceptions are inappropriate. ~~One purpose of the follow-up questions in the June 15 letter was to clarify the commitment and obtain more detail about its implementation. We believe that Joint Applicants have provided the detail we sought, and that the limitations and caveats placed on the commitment are appropriate. Indeed, in many cases the limitations – such as that price terms from other states not be automatically imported to Illinois – are supported by Staff and are necessary to preserve this Commission's role in shaping competitive policy in Illinois.~~ We believe one of AT&T's proposals best meets the problems outlined ~~above by SBC and~~ by the CLECs. Joint Applicants should provide CLECs in Illinois the same services, facilities or interconnection agreements/arrangements, except as to price, that any SBC ILEC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration in another state. If SBC believes that a particular provision or agreement is technically unfeasible in Illinois, on contrary to Illinois law or policy, SBC would bear the burden of proof of same. SBC could also request a waiver of any provision or agreement/arrangement or arbitration.

Likewise, the proposed interconnection commitment as drafted will certainly generate ~~while there may be~~ future disputes about what arrangements from other SBC states are "technically feasible" in Illinois or whether a CLEC in Illinois is "similarly situated" to the SBC CLEC. Accordingly, we strike these caveats from the interconnection commitment. If Joint Applicants have a problem with importing a particular arrangement into Illinois, they can negotiate with the CLEC. If that fails, they can request relief from the Commission. The presumption, however, is that any interconnection provision (voluntary or arbitrated) offered anywhere by an SBC ILEC will automatically be offered in Illinois upon the merger closing date. ~~, that is not a reason to reject or modify the commitment. Technical feasibility is already a limitation on "most favored nation" rights (*see* 47 C.F.R. § 51.809); the only difference now is that Illinois CLECs will have a potentially much broader group of arrangements to choose from in seeking to adopt provisions from other contracts, which benefits the CLECs. That represents a benefit that would not exist without the merger.~~

The Commission concurs with ~~Regarding~~ the concern of some parties that Interconnection Commitment D does not include terms and conditions obtained by the SBC CLEC through most-favored nation rights. There is simply no plausible reason for this exception. We must assume that there are particular procompetitive MFN provisions that Joint Applicants do not want to offer in Illinois. We therefore conclude that MFN provisions obtained by any SBC CLEC must be automatically offered in Illinois. Again, if Joint Applicants have a particular problem, they can negotiate with the CLEC and, failing that, seek relief from the Commission. However, the presumption is that *all* interconnection provisions obtained by Joint Applicants out of region should be immediately

offered in Illinois. ~~, we agree with Joint Applicants that importation of such terms is not necessary. The theory prompting Interconnection Commitment D is that the SBC CLEC could exercise unique bargaining power to extract unique contract terms from out-of-region incumbent LECs. The exercise of most-favored nation rights requires no bargaining power or special expertise at all; the SBC CLEC would just get the same deal as a prior CLEC. Thus, we will not expand Interconnection Commitment D beyond the specific Commitment made by Joint Applicants.~~

Our rejection of Joint Applicants' interconnection limitations and exceptions and our adoption of an automatic importation requirement, likely lessens the need for or at least the demands on e ~~believe that~~ the proposed collaborative process among Joint Applicants, Staff, and other parties, but we believe such a process can serve a useful purpose and we - strongly encourage the parties to work together in this process to resolve interconnection issues and disputes short of litigation. We also will seriously consider the proposals that one or more Commissioners participate directly in this collaborative process, though we need not resolve that issue here.

~~Finally, it should be remembered that these commitments do not affect this Commission's authority over Ameritech Illinois. This Commission will retain its full authority to ensure compliance with each of these commitments and any other provisions of the order approving this merger~~

2. The interconnection commitment language on pages 138-142 of the

HEPOR should be should be stricken and **replaced** with the following language:

(29) Interconnection - Ameritech Illinois will provide interconnection in accordance with the following interconnection commitments:

Interconnection Conditions A and D

A. Ameritech Illinois shall automatically provide to CLECs in Illinois all services, facilities or interconnection agreements/arrangements offered by SBC in its in-region states. These interconnection provisions shall be made available without regard to whether SBC voluntarily agreed to these provisions, arbitrated the provisions, or otherwise.

Ameritech Illinois shall also automatically provide to CLECs in Illinois all services, facilities or interconnection agreements/arrangements obtained by SBC and/or any SBC subsidiary/affiliate in any territory outside its current region. These interconnection provisions shall be made available in Illinois without regard to whether they were arbitrated, negotiated or obtained via most favored nation clauses.

Joint Applicants shall provide a list of all such interconnection provisions to Illinois CLECs prior to the Merger Closing Date.

- Ameritech Illinois may request a waiver of any provision of an agreement/arrangement or arbitration. However, the presumption is that all interconnection provisions being provided by SBC and/or its ILEC affiliates will be imported into Illinois.

- Ameritech Illinois shall not be required to offer to CLECs in Illinois UNEs, services, facilities or interconnection agreements/arrangements at the same rates or prices as SBC makes such offerings in SBC in-region territories since costs may and do vary by state, and pricing in each state reflects state pricing policies and costs. However, Ameritech Illinois should not be permitted to delay implementation of any interconnection provision on the basis of pricing. Accordingly, Ameritech Illinois will provide interim prices for all interconnection provisions described in subsection A above before the Merger Closing Date. Furthermore, interim prices for any subsequent (i.e., new) interconnection provisions that fall under subsection A shall be made available immediately upon an interconnection provision being imported into Illinois.

- This commitment shall not be affected by changes in applicable law. A commitment presupposes an obligation to do something above and beyond the legal minimum. We will not allow Joint Applicants to simply "commit" to doing the legal minimum.

Interconnection Conditions B and C

B. A workshop or collaborative process should be unnecessary as we have ordered Joint Applicants to make the applicable interconnection provisions available in Illinois automatically. However, to coordinate and facilitate matters, no later than 30 days after the Merger Closing Date, Joint Applicants shall convene a workshop or collaborative process with Staff and CLECs to discuss the UNEs, services, facilities or interconnection agreements (and their interim prices) which are now being provided by SBC (in region) or have been obtained by SBC (out of region), and which are now automatically available in Illinois.

III. SHARED TRANSPORT

The HEPOR thoroughly endorses and adopts the treatment of the Shared Transport issue suggested by Joint Applicants. Both in the Commission Analysis and Conclusion[31] and in the articulation of the conditions relating to this issue,[32] however, the HEPOR is erroneous. Not only does it reach the incorrect result, it does so based on incorrect factual predicates and it rests on reasoning that should be resoundingly rejected, not endorsed, by the Commission.

The HEPOR begins by observing, correctly, that CLECs "have long argued for shared transport, and it now will be made available to all who amend their interconnection agreements consistent with Joint Applicants' commitment." It continues: "Thus, Joint Applicants have committed to do what represents a procompetitive benefit that will accrue to both CLECs and end-users and that would not exist absent the merger."[33] The irony will not be lost on anyone who has observed, however casually, the course of litigation in the wake of TA96. Surely the Commission will recall that Ameritech has been required to provide shared transport, not only by the FCC but by this Commission[34] as well. To turn Ameritech's agreement (now that it is in the position of wanting something from the Commission) to cease noncompliance with its legal obligations into a "procompetitive benefit" that "would not exist absent the merger" is breathtakingly ill-conceived. Ameritech should be penalized, "absent the merger," into

[31] HEPOR at 60-61.

[32] HEPOR at 142-45.

[33] HEPOR at 61.

[34] As Staff's witness testified, Ameritech was expressly ordered to provide shared transport in the TELRIC Order, and that order is still in effect. Staff Ex. 5.02, at 2.

compliance with its obligation. Anything less is an affront to the Commission and its authority.

The HEPOR is flawed in other respects as well. Its discussion begins, for example, with the conclusion that Joint Applicants' shared transport commitment is "responsive" to the Commission's questions and concerns. It proceeds: "We also find that the shared transport commitment is sufficiently specific and subject to adequate enforcement mechanisms."[35] Again, however, as with the interconnection commitments, enforcement mechanisms are simply non-existent. There are none whatsoever, and saying so does not make it otherwise.

Further, on the issue of the effect of the FCC's UNE Remand proceeding, the HEPOR states: "If the FCC or a court finds that shared transport is not a network element that must be unbundled, any requirement that Ameritech Illinois continue to provide it (while no other incumbent LEC has to provide it) would be unfair to Ameritech Illinois and directly inconsistent with federal law." If "fairness" to the ILEC is the standard, certainly an argument can be made that the only RBOC that has refused illegally to provide shared transport should be the last to be relieved from the obligation. Beyond that, however, the HEPOR goes out of its way to prejudge the legal effect of a future FCC order. This Commission, among others, has in fact suggested to the FCC that it define a minimum list of UNEs but that the states have the flexibility under TA96 to require the provision of additional UNEs: "The ICC further notes that a state may determine under State law that additional elements must be unbundled in order to

[35] HEPOR at 60-61.

promote competition in its local exchange markets."[36] There is absolutely no reason this Commission should attempt to anticipate the scope and effect of any future FCC orders, as the HEPOR would do.

Finally, with respect to proposed condition (31), the HEPOR incorporates wholesale the assertion that the proposed "interim" version of shared transport "avoids or addresses" the "technical and network issues" Ameritech had raised in the TELRIC proceeding ("Dedicated links and custom routing"; "Measuring terminating call detail"; "Identifying the local carrier"; and "Providing common/shared transport on an unbundled basis"). First of all, as AT&T witness Turner testified (and his testimony is completely unrebutted on this point), the "issues" which Joint Applicants list all relate to unbundled switching, not shared transport.[37] Ameritech is simply trying to perpetuate the baseless notion that there are technical impediments to providing shared transport, when in fact there are none. Joint Applicants' proposal in this respect represents an effort to gain legitimacy for these claims by reciting them in a Commission order—something it could point to in the future to say the claims had validity. Yet this Commission has expressly rejected these same claims in its TELRIC Order[38] and the FCC has done so as well.[39]

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[36] Implementation of the Local Competition Provisions in the Telecommunications Act, CC Docket No. 96-98 et al., Comments of the Illinois Commerce Commission at 2.

[37] See AT&T Brief on Reopening, at 38.

[38] ICC Docket No. 96-0486/0569 (Consolidated), Second Interim Order February 17, 1998) at 115 ("The Commission also rejects Ameritech's concerns as to the technical feasibility of providing billing information to CLECs in order for them to bill IXCs for terminating access under Staff and intervenors' definition of common transport. The Commission agrees with AT&T and MCI that it is indeed technically feasible for Ameritech to provide information to CLECs . . . sufficient to allow UNE subscribers to bill IXCs terminating carrier access charges. The Commission finds it quite instructive that many other RBOCs have voluntarily agreed to or have been ordered by state commissions to provide such information.")

Thus, this language is not only unnecessary, it is improper. At a minimum the sentence at the bottom of page 142 referring to the "technical and network issues that Ameritech Illinois identified in its TELRIC tariff filing, and the four paragraphs beginning at the top of page 143 of the HEPOR should simply by deleted.[40] Accordingly:

AT&T Exception No. 3:

AT&T excepts to the analysis and conclusions and to the findings in the Proposed Order with respect to Shared Transport, on the grounds that they are arbitrary, unsupported in the record and inconsistent with prior orders of the Commission, and proposes the following modifications to the

1. At pages 60-61 of the HEPOR, **delete** three existing paragraphs under "Commission Analysis and Conclusion" and **replace** with the following:

> Shared Transport is a prerequisite to any near term broad-based local service competition. Because Shared Transport is an essential element of the UNE Platform, Ameritech cannot provide the Platform as long as it refuses to provide CLECs with the Shared Transport element. Given the record before us, we are compelled to agree that Ameritech's history of refusing to provide Shared Transport and the Platform, in contravention of this Commission's and the FCC's orders, has frustrated this Commission and CLECs alike. Indeed, the lack of local competition in Illinois can be traced in large measure to Ameritech's refusal to provide Shared Transport and the Platform. For this reason, we posed specific questions to Joint Applicants seeking specific and unqualified responses as to the "manner, necessary actions and timetable" by which Joint Applicants would provide Shared Transport and Unbundled Local Switching in Illinois.

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[39] Third Order on Reconsideration, FCC Docket No. 96-98 (August 18, 1997) at para. 26 and n. 77. Addressing Ameritech's specific technical claims, the FCC stated: "We. . .find no evidence that it is not technically feasible to provide shared transport." Id. n. 77.

[40] The language concerning the provision of shared transport on an unbundled basis is particularly egregious in this regard. It states: "The Supreme Court has expressly reinstated the FCC's rule, which required incumbent LECs to provide pre-assembled combinations of unbundled network elements, assuming each element in the combination is capable of being purchased separately." (Emphasis added.) The assertion that a UNE must be "separable," however, is exactly the argument that Ameritech made to the Supreme Court and which the Supreme Court rejected. *Iowa Utilities Bd.*, __ U.S. __, 119 S. Ct. 721 (1999).

Joint Applicants' proposed commitment to provide Shared Transport and Unbundled Local Switching in Illinois falls short of creating any pro-competitive benefit. In fact, Joint Applicants' offer of Shared Transport as proposed is a hollow one because competitive LECs could not readily use it in the form that Joint Applicants are prepared to offer it. As with any network element, to use Shared Transport competitive LECs must have the ability to order it via nondiscriminatory access to OSS. As part of its refusal over the past three years to provide Shared Transport, however, Ameritech has never developed the appropriate OSS to order Shared Transport in conjunction with other network elements. Before they can be put to practical use by CLECs, the "interim" and "long-term" solutions to shared transport will have to be accompanied by appropriate OSS offerings. Joint Applicants make much of the fact that they are "importing" solutions developed by SBC in order to provide Shared Transport. The OSS developed by SBC to allow Shared Transport to be ordered and provisioned must be made available as well before Joint Applicants can be deemed to be providing Shared Transport. Consequently, we will require that Joint Applicants make available Shared Transport and the OSS necessary to support the provision of Shared Transport and the UNE Platform before the merger closing.

2. At pages 142-44 of the HEPOR, **delete** Subsections A and B and **revise** to read as follows:

(30) Shared Transport – Ameritech Illinois will provide shared transport in accordance with the following shared transport commitment:

No later than the merger closing date, SBC/Ameritech shall provide shared transport (as defined in the FCC's Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC Docket No. 96-98 (August 17, 1997), as an unbundled network element at usage sensitive (minutes of use) rates that are based on forward-looking, economic costs for use in providing telephone exchange and/or exchange access service. SBC/Ameritech shall provide such shared transport in conjunction with unbundled local switching, for traffic that is originated and terminated to a purchasing carrier's end user subscriber to be routed in the same manner as SBC/Ameritech's own traffic without the payment of interexchange access charges. SBC/Ameritech shall provide OSS to order shared transport by the merger closing date. SBC/Ameritech shall not require use of dedicated transport or customized routing to complete calls using local switching and shared transport.

IV. OSS IMPLEMENTATION

In just one page of analysis, the HEPOR accepts in total Joint Applicants' proposal for deployment of OSS interfaces post merger and integration of Joint Applicants' OSS processes, including Joint Applicants' proposed three-phase collaborative.[41] The only purported justification for this rote adoption of Joint Applicants' OSS conditions is that the Hearing Examiners evidently found that Joint Applicants' proposal was "responsive" to the Commission's questions and would bring a "procompetitive benefit" to Illinois that would not exist absent the merger.[42] The HEPOR fails to give any factual support for this conclusion.

None exists. Indeed, the HEPOR does not even attempt to address the myriad of criticisms posed by Intervenors regarding Joint Applicants' OSS commitments. If the Commission is prone to approve this merger based on a set of OSS conditions, it cannot simply adopt Joint Applicants' proposals and dub them "procompetitive" without first addressing the failures and ambiguity of those proposals.

Application-to-Application and Graphical User Interfaces

First and foremost, the HEPOR fails to address the fact that the Commission still has no idea what system interface changes and OSS enhancements Joint Applicants will actually make, if any, in Illinois after the merger closes. On cross-examination the intervening CLECs repeatedly asked Mr. Viveros pointed questions to ascertain what

[41] HEPOR at 72-3.

[42] HEPOR at 72. AT&T also takes exception to the HEPOR's conclusion that these OSS changes would not occur "absent the merger." Certainly there is no reason why Ameritech could not make these OSS changes absent the merger, nor is there a reason why the Commission could not order Ameritech to make such changes. In the event the merger is not consummated, Ameritech could improperly attempt to use this language to avoid its legal obligations. This language should be omitted.

those OSS changes would actually include, and Mr. Viveros repeatedly answered that he was "not necessarily" sure what they were.[43]

Not only did Joint Applicants fail to state with specificity what OSS changes they plan to make post-merger, but there is no record evidence to indicate that Joint Applicants have committed to changing the status quo in any way in regard to Ameritech's OSS systems. Thus, there is certainly no evidentiary support for a conclusion that Joint Applicants' OSS commitment is procompetitive, much less responsive to the Commission's questions. The result of this ambiguity is that the HEPOR gives Joint Applicants unfettered "wiggle room" for the future in defining what they have, or have not, committed to in relation to developing and deploying new OSS interfaces in Illinois.

If the merger is not to be rejected, the only tenable solution to this problem is for Joint Applicants to specify their proposed OSS changes before the merger closes. Thus, it would be appropriate for the Commission to require that in advance of merger closing, Joint Applicants must complete a publicly available plan of record, which should consist of an overall assessment of SBC's and Ameritech's existing OSS interfaces, business processes and rules, hardware capabilities, data capabilities, and differences, and SBC's and Ameritech's plan for developing and deploying application-to-application interfaces and graphical user interfaces of OSS, as well as integrating their OSS processes. This plan should then be accepted (or rejected) by the Commission before the merger closes.

Putting such a plan together in short order would not pose a hardship for Joint Applicants; and even if it is, it is a hardship of their own making.[44] The record

[43] Tr. at 2157-58, 2196-98.

established that while Joint Applicants were negotiating their OSS commitments at the FCC – and before their testimony was filed in this case – a series of meetings took place between SBC and Ameritech personnel regarding Ameritech's OSS systems.[45] SBC witness Mr. Viveros, who was present at those meetings, admitted that he would use them "in working through plans to integrate the systems of Ameritech and SBC."[46] Thus, Joint Applicants have already begun the process of integrating the systems. Moreover, at the FCC Joint Applicants have committed "no later than merger closing" to provide the FCC an OSS Process Improvement Plan identifying "the OSS changes that are needed to implement SBC/Ameritech's OSS commitments."[47] And, since Joint Applicants admit that those FCC OSS commitments subsume their Illinois commitments, there certainly is no reason for Joint Applicants not to have completed their Illinois OSS plan before merger closing.[48]

Open-ended Arbitration

The HEPOR also fails to account for the illusory nature of Joint Applicants' OSS commitments. The fundamental failure of Joint Applicants' three-phase collaborative concerning OSS is that any dispute in that collaborative triggers an open-ended

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[44] Nothing prevented Joint Applicants from beginning this OSS planning months ago, as evidenced by their recent OSS meetings. As AT&T noted in its initial brief, Joint Applicants' failure to conduct such meetings until the eleventh-hour conveniently allowed them to claim plausible deniability in relation to their OSS plans. By failing to order Joint Applicants to make their OSS plans more definite before merger closing, the HEPOR tacitly endorses Joint Applicants' strategy of obfuscation.

[45] Cross Ex. B.; Tr. 2165-2168.

[46] Tr. 2168-69.

[47] FCC Proposed Conditions, Para. 8.

[48] Tr. 2171.

arbitration process that would indefinitely delay all of Joint Applicants' commitments to deploy even those OSS changes that CLECs and Joint Applicants may have agreed on in the OSS collaborative. Moreover, the process itself fails to account for the fact that it could take more than two months for Joint Applicants and CLECs to come to agreement on all the issues to be discussed in that collaborative (e.g. changes in OSS interfaces and corresponding timelines, business rules regarding those interfaces, etc.). Under Joint Applicants' proposal, however, CLECs have absolutely no ability to even voluntarily extend the length of this collaborative to allow the parties to come to a mutual agreement and avoid the open-ended arbitration process.

The practical and likely result of Joint Applicants' rigid three-phase collaborative process is that Joint Applicants would unilaterally force the process to arbitration and then refuse to do any work on the development or deployment of OSS interfaces until they have received the arbitrator's decisions in all matters in dispute. Thus, even if CLECs and Joint Applicants were to come to agreement on some, but not all, OSS issues, Joint Applicants could refuse to implement even those OSS enhancements until the arbitration was complete. There is also no "out clause" to Joint Applicants' proposed timeline if Illinois CLECs (or perhaps both the CLECs and Joint Applicants) wished to extend the collaborative deadlines as opposed to taking it directly to an arbitrator. Taken together, these facts demonstrate that this rigid collaborative will likely result in an unbounded arbitration process and certainly increase Joint Applicants' incentive and ability to take a "take it or arbitrate it" position in that collaborative negotiation.

If the Commission is prone to approving the merger with OSS conditions, it should revise Joint Applicants' proposed three-phase process for deployment of application-to-application interfaces and graphical user interfaces as follows:

- As noted above, Phase I of the collaborative should be completed by merger closing.

- The parties should have the flexibility to elongate the timeframes for Phase II (the face to face collaborative) by either mutual agreement or pursuant to Commission approval of a reasonable request for an extension by a participating party. This will give SBC/Ameritech less incentive to take a "take it or arbitrate" stance in that collaborative and will otherwise give the parties additional time to negotiate if the Phase II timeframes become unrealistic.

- Absent an agreed to, or Commission approved, extension, Phase II should be completed in three months, including any potential arbitration. Such a requirement would eliminate the result that all the open OSS issues are punted to an arbitration of undefined duration. By providing a definite timeframe to resolve such disputes, the Commission will assure that Joint Applicants' OSS commitments will actually be implemented within a reasonable and certain amount of time.

- The Phase II process would work as follows: If the CLECs and SBC/Ameritech have not reached agreement after one month of collaborative sessions with ICC staff and Illinois CLECs (unless there is a mutually agreed to, or Commission approved, extension), the parties shall prepare a list of the unresolved issues in dispute and submit the remaining unresolved issues in dispute to consolidated binding arbitration. The parties would submit the unresolved issues to binding arbitration no later than one week after the conclusion of the collaborative sessions (unless there is a mutually agreeable extension). Any such consolidated binding arbitration should be conducted before an independent third party arbitrator in consultation with subject matter experts selected from a list of three firms supplied by SBC/Ameritech and three firms supplied by the CLECs. This arbitration shall be concluded within 7 weeks of submission of the unresolved issues (unless there is a mutually agreeable extension). The independent third-party arbitrator should be chosen by agreement of the parties and, if intervention is necessary, by two arbitrators, one chosen by the CLECs and one chosen by Joint Applicants.

- The date for completion of Phase III – that is the actual deployment of the OSS interfaces -- should be 12 months after completion of Phase II, unless a majority of the CLECs participating in Phase II agree to an extension. There is no reason for Phase III to take 18 months, as proposed by Joint Applicants

and accepted without reservation by the HEPOR. In fact, in Ohio Joint Applicants have committed to implement all OSS improvements resulting from the merger within six months of merger closing. (Ohio Stipulation and Recommendation, Section IV.A.3 ("SBC/Ameritech further agree to implement such improvements to Ameritech Ohio's OSS systems within 180 days of Merger Closing . . . .")) The completion date should begin to run after the completion of the written agreement in Phase II, or the effective date of a final decision by the arbitrator in Phase II, whichever is later.

- All issues that are resolved in the Phase II collaborative should immediately proceed to Phase III after one month, even if other issues are pushed into an arbitration. This revision assures that Joint Applicants cannot refuse to implement agreed to OSS changes where certain other OSS issues may be pending in arbitration.

- If one or more CLECs contend that SBC/Ameritech has not developed and deployed the system interfaces, enhancements, and business requirements consistent with the written agreement obtained in Phase II, or has not complied with the arbitrator's decision received in Phase II, they should be allowed to submit the contested issues to binding arbitration. Any such consolidated binding arbitration should be conducted before an independent third party arbitrator in consultation with subject matter experts selected from a list of three firms supplied by SBC/Ameritech and three firms supplied by the CLECs. This arbitration shall be concluded within 2 months. The independent third-party arbitrator should be chosen by agreement of the parties and, if intervention is necessary, by two arbitrators, one chosen by the CLECs and one chosen by Joint Applicants.

- Finally, the Commission should make it clear that Joint Applicants' OSS commitments do not sunset after three years. Although it is unlikely that Joint Applicants will "undo" OSS work already completed, this revision will simply add certainty to that likelihood.

Direct Access to Service Order Processing Systems

A further error in the HEPOR's OSS section is that although Joint Applicants agree to offer direct access to Ameritech's service order processing systems for resold services and UNEs, it requires that the requesting CLEC pay for development of such systems. SBC previously committed to CLECs that it would make direct access to such systems available to all competitive LEC OSS subscribers in Southwestern Bell territory

at no additional OSS access charge and without passing on SBC's development costs.[49] CLECs were to be charged only for attending classroom training.

Now Joint Applicants propose to charge CLECs for the costs of developing direct access to its systems as well as training costs. Moreover, for absolutely no reason, Joint Applicants' offer is limited to a period of 30 months after the merger closing date, and any CLEC requesting such access must negotiate and enter into a written contract with SBC. This proposed condition represents a step backward to an earlier position of SBC in Texas that such access would be made available to CLECs only on a bona fide request basis with unspecified development costs to be paid by the competitive LEC.

Further, it makes no sense for CLECs to have to pay for Ameritech to revise its systems to allow CLECs to have access to those systems at parity with Ameritech's own retail units. CLECs should not be forced to pay for systems changes that are necessary for Ameritech to comply with the law. The 30-day limitation also discriminates against CLECs not yet in the Illinois market.

The Commission should instead order Joint Applicants to offer to develop direct access to Ameritech's service order processing system for resold services, UNEs and UNE combinations. In order to assure compliance with this condition, the Commission should require that before the merger closing date, Joint Applicants provide written notice of the specific systems that Ameritech should make available for direct access and the committed date by which such access will be provided, including comprehensive user training for interested CLECs. Upon submission of this documentation, this Commission

[49] *See* Texas Collaborative Process Workshop at 616-17 (Texas PUC Aug. 28, 1998) ("the development cost to make SORD generally available would be absorbed by Southwestern Bell") (L. Ham).

should seek comments from interested CLECs and make a binding determination regarding whether or not the proposal of SBC/Ameritech fulfills the intent of this provision. The only charges associated with any development necessary to provide such access that should be passed on to CLECs are those reasonable costs associated with delivering user training classes.

Third Party OSS Testing

On the extremely important issue of third-party testing of OSS, the HEPOR agrees with Staff witness McClerren that there is no need "to appoint a specific entity to perform such testing as part of this case" and further agrees with Joint Applicants "that no such testing needs to be mandated at this time." AT&T and others have, to the contrary, urged the Commission to establish a clear requirement of third-party testing of the ILEC's OSS system based upon the so-called "New York" model. That is, as Mr. Turner testified, it is vital that a truly independent, technically-skilled third party be engaged to design the testing, conduct it, monitor the results, oversee corrections and retest, and report on the test. The test entity should act as a "pseudo CLEC" in the sense that it creates and transmits the kinds of orders ("order scenarios") to be expected from the CLEC community. As Mr. Turner noted, independent third-party testing can expedite the identification and resolution of problems with SBC/Ameritech's OSS, without being sidetracked into the kind of "finger pointing" that can otherwise arise. Thus, the Commission should take this opportunity to establish an independent third-party testing requirement.

Beyond deferring the decision, however, the HEPOR articulates a rationale concerning the future need for third-party testing that is simply wrong. It states that the

"combination of CLEC collaboration, Commission oversight, and strict penalty enforcement reduces the need for independent third party review."[50] The fallacy is that CLEC collaboration and Commission oversight may establish the systems improvements that SBC/Ameritech are to make, but they do not test to see if they are working properly.[51] As pointed out elsewhere, what the HEPOR characterizes as "strict penalty enforcement" is hardly that, but in any event the penalties attach to implementing (unspecified) benchmarks or measurements. That is no solace to the local customer who loses service in the process of attempting to change local carriers. The suggestion that systems can simply be placed in operation without independent third party testing shows little regard for end-user customers in Illinois. To simply send orders to Ameritech without any assurance that its systems are volume tested would be irresponsible of all parties. Accordingly,

AT&T Exception No. 4:

AT&T excepts to the analysis and conclusions and the findings reached in the HEPOR on the issue of OSS implementation on the grounds that they are arbitrary, fail to account for the indefiniteness and ambiguity in Joint Applicants' OSS commitments, and are otherwise unsupported by the record, and propose the following modifications to the text on this issue:

[50] HEPOR, p. 72.

[51] Ameritech declared its Operating Support Systems ready in January of 1997; the FCC found otherwise in its ruling on the Ameritech Michigan Section 271 application in August of that year.

1. The entire Commission Analysis and Conclusion section starting on page 72 of the HEPOR and ending at the top of page 73 of the HEPOR should be **deleted** and **replaced** with the following text:

Commission Analysis and Conclusion

While we sought specific and detailed information from Joint Applicants regarding their plans to deploy application-to-application interfaces in Illinois, or otherwise change Ameritech's OSS systems, Joint Applicants have unfortunately provided vague and indefinite promises that give us little to no information regarding what OSS changes Joint Applicants propose to make, or the timeframes in which the Joint Applicants propose to make such OSS changes.

First, Joint Applicants have failed to provide any detail regarding what OSS enhancements Joint Applicants will actually make, or even propose to make, post merger. While Joint Applicants agree that their Illinois OSS commitment are subsumed within the FCC OSS commitment to implement "uniform" interfaces and business rules (Tr. 2172), Joint Applicants have failed to give any information regarding what this commitment actually means. Joint Applicants' witness Mr. Viveros repeatedly answered "not necessarily" when asked whether that commitment means that SBC/Ameritech will provide the same OSS interfaces and business rules throughout their 13-state region or whether Joint Applicants will deploy the same version of EDI , the electronic interface for pre-ordering and ordering UNEs. Based on this information, the Commission frankly is left without any commitment regarding what OSS changes, if any, Joint Applicants will make to Ameritech's systems.

We note that SBC has had well over a year to conduct an analysis of Ameritech's systems and, at the very least, give some indication regarding what OSS enhancements it plans to make post-merger. But the record demonstrated that SBC and Ameritech did not conduct any meetings to discuss these OSS issues until May of 1999. The Commission questions why SBC/Ameritech waited to the last minute before attempting to develop some plan regarding what OSS enhancements they will make post-merger.

In order to alleviate this ambiguity, we require that in advance of the merger closing date, SBC/Ameritech shall complete a publicly available Plan of Record (which shall consist of an overall (and general) assessment of SBC's and Ameritech's existing OSS interfaces, business processes and rules, hardware capabilities, data capabilities, and differences, and SBC's and Ameritech's plan for developing and deploying uniform application-to-application interfaces and graphical user interfaces for OSS) that shall be accepted by this Commission based on an expedited (two week) CLEC comment cycle.

Our acceptance of the Phase I plan is a prerequisite to our approval of this merger. Our acceptance of the Phase I plan shall only be intended to move forward with Phase II and shall not be binding on the parties participating in Phase II or should such acceptance otherwise be viewed in any way as Commission approval of that plan.

We also believe that Joint Applicants' proposed three-phase OSS collaborative, although a reasonable starting point, fails to bring sufficient certainty to Joint Applicants' OSS commitments. On the whole, we find Joint Applicants' proposed timeframes illusory because any dispute in that collaborative triggers an open-ended and undefined arbitration process that would indefinitely delay all of Joint Applicants' commitments to deploy even those OSS changes that CLECs and Joint Applicants have agreed on in the OSS collaborative. We are also concerned that the process itself may be too short, as it gives only two months for CLECs and Joint Applicants to come to an amicable agreement regarding a complete revamp of Ameritech's OSS interfaces and business rules. Unfortunately, Joint Applicants' proposed three-phase collaborative gives no "out clause" if CLECs (or perhaps both the Joint Applicants and the CLECs) wish to extend the collaborative deadlines as opposed to taking it directly to costly arbitration. We find that this process will increase the probability that SBC/Ameritech will take a "take it or arbitrate it" position in those shotgun collaboratives. We also believe that a prolonged arbitration could negate any benefit from Joint Applicants' OSS commitments.

Therefore, we order as a condition of merger approval that Phase II (the face-to-face collaborative) should take a total of three months, including any potential arbitration. We believe this requirement will help assure that Joint Applicants meet their OSS commitments in a certain and reasonable amount of time. Although we are hopeful the parties can come to agreement in this short amount of time, in case the Phase II timeframes prove unrealistic, the parties should be allowed to elongate those Phase II timeframes by either mutual agreement or pursuant to Commission approval of a reasonable request for an extension by any participating party.

The Phase II process would work as follows: if the CLECs and Joint Applicants have not reached agreement after one month of a collaborative sessions with ICC staff and Illinois CLECs (unless there is an extension of the collaborative as described above), the parties shall prepare a list of the unresolved issues in dispute and submit the remaining unresolved issues in dispute to binding arbitration no later than one week after the conclusion of the collaborative sessions (unless the parties come to a mutually agreeable extension). Any such consolidated binding arbitration shall be conducted before an independent third party arbitrator in consultation with subject-matter experts selected from a list of three firms supplied by SBC/Ameritech and three firms supplied by the CLECs. This arbitration shall be concluded within 7 weeks of submission of the unresolved issues (unless there is a mutually agreeable extension). The

independent third-party arbitrator should be chosen by agreement of the parties and, if intervention is necessary, by two arbitrators, one chosen by the CLECs and one chosen by Joint Applicants.

We also believe the 18 month deployment timeframe in Phase II – that is the actual deployment of the OSS interfaces – is far too long. In Ohio Joint Applicants committed to implement all OSS improvements resulting from the merger within six months of merger closing. We see no reason why Joint Applicants need an additional 12 months in Illinois. Thus, the completion date of Phase III is revised to be 12 months after completion of Phase II, unless a majority of the CLECs participating in Phase II agree to an extension. The completion date shall begin to run after the completion of the written agreement in Phase II, or the effective date of a final decision by the arbitrator in Phase II, whichever is later.

However, in the event that certain issues are resolved in Phase II, while others are removed to arbitration, we hold that all such resolved issues shall immediately proceed to Phase III. This revision assures that Joint Applicants cannot refuse to implement agreed-to OSS changes where certain other OSS issues may be pending in arbitration.

We are also concerned that Joint Applicants have failed to delineate with any specificity the manner in which a CLEC may resolve a dispute with Joint Applicants over whether or not Joint Applicants have actually completed their commitment in Phase III. Therefore, we order that if one or more CLECs contend that Joint Applicants have not developed the system interfaces, enhancements, and business requirements consistent with the written agreement obtained in Phase II, or has not complied with the arbitrator's decision received in Phase II, they shall be allowed to submit the contested issues to binding arbitration consistent with the procedures established above, except that the arbitration shall conclude within two months.

Although we believe there is little likelihood that Joint Applicants will undo the systems changes they complete, we hold that Joint Applicants' OSS provisions of this order do not sunset after three years.

We also revise Joint Applicants' commitment in regard to giving Illinois CLECs direct access to Ameritech's service order provisioning. Joint Applicants propose to have the requesting CLEC pay for development of such systems and have only agreed to limit their offer to a period of 30 days after merger closing. First, we find no reason for this offer to be limited, since it is essential to assuring that Joint Applicants are providing OSS to CLECs at parity to Joint Applicants' own retail units. In other words, Joint Applicants are already obligated to provide Illinois CLECs direct access to the same systems used by Joint Applicants' retail units. We do not believe it is appropriate to have CLECs pay for system upgrades that assure that Joint Applicants are complying with federal and Illinois law. We

note that in Texas SBC said that it would make direct access to such systems (in SBC's case the "SORD" system) available to all CLEC OSS subscribers at no additional charge and without passing on SBC's development costs.[52] Thus, as a condition of our approval of this merger, we order Joint Applicants to offer to develop direct access to Ameritech's service order processing system for resold services, UNEs, and UNE combinations. We further require that Joint Applicants provide written notice of the specific systems that Ameritech will make available for direct access and the committed date by which such access will be provided, including comprehensive user training for interested CLECs. Upon submission of this documentation, this Commission will seek comments from interested CLECs and make a binding determination regarding whether or not the proposal of SBC/Ameritech fulfills the intent of this provision. The only charges associated with any development necessary to provide such access that should be passed on to CLECs are those reasonable costs associated with delivering user training classes.

Finally, there has been a dispute between the parties whether or not third-party testing of Joint Applicants' OSS systems is a necessary prerequisite of merger approval. We believe it is. While CLEC collaboration and Commission oversight may establish the systems improvements that Joint Applicants are to make, they do not test to see if they are working properly. Benchmarks, measures and self-actuating penalties are of no use to a customer who loses service in the process of attempting to switch local carriers. The Commission shares the view of Illinois CLECs that they should not be forced to send orders to Ameritech, thereby placing their brand-name and the customer's service on the line, without any assurance that Ameritech's systems are volume tested. It is vital, therefore, that an independent, technically-skilled third party be engaged to design the testing, conduct it, monitor the results, oversee corrections and retest, and report on the test. The third-party should act as a "pseudo-CLEC" in the sense that it creates and transmits the kinds of orders to be expected from the CLEC community. We believe that third-party testing based on the so-called "New York" model is appropriate, but we decline to establish any further particulars regarding this testing in this order. We believe the OSS collaborative should resolve issues regarding implementation of third-party testing with our holding herein as a general framework.

2. On page 145 of the HEPOR **replace** section A "OSS Conditions" and section B (page 147) "Additional OSS Commitments," and the language following Commitment 32 (page 147), "Performance Measuring, Benchmarks and Liquidated Damages," which ends at the top of page 151, with the language included in Attachment

[52] Texas Collaborative Process Workshop Transcript at 616-17 (Texas PUC August 28, 1998) ("the development cost to make SORD available would be absorbed by Southwestern Bell").

A to this brief. Because of the length of this section, AT&T's proposed language is set forth in a separate attachment, which also includes AT&T's revisions to Joint Applicants' commitments regarding OSS, performance measures, and liquidated damages.

V. PERFORMANCE MEASURES/LIQUIDATED DAMAGES/ ENFORCEMENT MECHANISMS

Performance Measures

Most fundamentally, the HEPOR fails to account for the fact that although Joint Applicants have committed to implement 79 of the Texas performance measures and benchmarks[53] within 300 days of merger closing, Joint Applicants did not and could not list what these 79 measures would be, except to say that 36 of the 79 will include those measures and benchmarks committed to at the FCC.[54] The Commission certainly cannot conclude that Joint Applicants' commitment in this regard is "procompetitive" when it does not even know the performance measures that Joint Applicants will implement in Illinois.[55]

In regard to measures/benchmarks beyond the 79, Joint Applicants have committed to implementing only those Texas measures/benchmarks that SBC/Ameritech believe are "technically and economically" feasible in Illinois. Joint Applicants have agreed to discuss their assessment of "technical and economical" feasibility in a

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[53] In lieu of parity comparisons, which would compare SBC's performance to itself against its performance to CLECs, many of the Texas performance measures compare SBC's performance to CLECs against a certain benchmark or standard performance. The failure of SBC to meet that benchmark triggers the liquidated damages provisions of the Texas plan.

[54] Tr. at 2278-80.

[55] HEPOR at 114, 121.

collaborative to begin 90 days after merger closing and lasting for 60 days. Assuming no dispute arose, Joint Applicants agreed to implement, within 210 days of merger closing, those measures /benchmarks they believe are "technically and economically feasible" to implement in Illinois. Thus, there is no certainty whether Joint Applicants will implement one Texas measure beyond the 79. Again, the HEPOR did not even discuss, much less address, these ambiguities.

Finally, by omission, the HEPOR preemptively assumes that those Texas measures and, more importantly, the related benchmarks are appropriate in Illinois. But there is absolutely no record support for such a presumption. Joint Applicants provided no information demonstrating that those Texas measures/benchmarks would support competition.[56] Such a showing is essential before the Commission can endorse any set of performance measures. In fact, the Texas performance measures use fixed benchmarks, rather than a parity comparison to the performance Joint Applicants provide to their own retail operations, as the performance criterion for many of its measurements. Returning a firm order confirmation, or mechanized completion notice, responding to pre-order queries, and maintaining operational support systems availability all have analogies in Joint Applicants' retail operation. The FCC has long recognized as much. Application of Bell South Corp, et al. for the Provision of In-Region, InterLATA Services in Louisiana 13 FCC Rcd. 20599 (1998), ¶¶ 100, 118, 120, 123, 128.

[56] Cross. Ex. C; Tr. 2280-2282. Parroting the proposed order of Joint Applicants, the HEPOR declares that: "[T]here is no guarantee that every measure is helpful to competition, as opposed to just being a burden for the incumbent LEC." (HEPOR, p. 121.) This type of loaded language is unneeded and dangerous. But most importantly, it is unsupported by the record, which was lacking on the issue of whether the Texas measures, or any additional performance measures, are appropriate in Illinois or would otherwise support competition.

In short, there was very little record evidence regarding whether the Texas measures and benchmarks are appropriate for use in Illinois, or are otherwise sufficient to promote competition. Thus, there certainly is no record in this case for the Commission to endorse those Texas performance measures and benchmarks in total, and the Commission should make that fact clear in its order.[57]

Liquidated Damages

Like the performance measures and benchmarks, the HEPOR accepts Joint Applicants' proposed liquidated damages and remedy plan in total. Joint Applicants' proposal in regard to liquidated damages is that they will import, *en masse*, the Texas liquidated damages provisions, except that the state-wide annual cap would be reduced from $120 million in Texas to $90 million in Illinois.

Again, there is certainly no record evidence for the Commission to accept this plan in total without any reservation. AT&T Attachment B to its initial brief noted several significant flaws with that plan that must be addressed before it is adopted by the Commission as the Illinois performance remedy plan. The HEPOR did not even mention these criticisms, much less did it conduct an in-depth analysis of the Texas performance remedy plan. Nor could it, since the record simply did not focus on the appropriateness of each and every provision of that Texas remedy plan. Therefore, the HEPOR should make it absolutely clear that the Commission has not endorsed that plan in total, but only

[57] AT&T also takes exception to the Commission's conclusion that these performance measures and liquidated damages plan would not occur "absent the merger." Certainly there is no reason why Ameritech could not implement these performance measures and liquidated damages plan absent the merger; nor is there a reason why the Commission could not order Ameritech to implement such a plan. If the merger is not consummated, Ameritech could improperly attempt to use this language to avoid implementing a performance measures/remedy plan.

views it as a sufficient starting point to a collaborative process regarding remedies for failing certain performance measures.

Sunsetting

In addition, the HEPOR wholly fails to address a key ambiguity in Joint Applicants' commitments regarding performance measures and remedies. Joint Applicants have not given any firm indication how long they will make these performance measures/benchmarks and liquidated damages available to Illinois CLECs. While SBC witness Mr. Dysart indicated that CLECs could, post-merger, incorporate the terms of those measures/benchmarks and the Texas liquidated damages plan into their interconnection agreements with Illinois CLECs, on cross-examination Mr. Dysart indicated that those terms would be available for three years, but beyond that answered that "a lot of things can happen."[58]

This ambiguity is especially troublesome since the existence of performance measures/benchmarks and self-actuating remedies will become all the more important if Joint Applicants receive 271 relief during this three-year period. Once Joint Applicants receive such relief, absent an appropriate self-actuating liquidated damage plan, Joint Applicants' incentive to provide Illinois CLECs adequate, nondiscriminatory service will vanish. The Commission should make it clear that the Joint Applicants' commitments regarding performance measures/benchmarks and liquidated damages do not sunset.

Proposed Revisions

In order to eliminate the vagueness of Joint Applicants' commitments concerning performance measures/benchmarks and associated remedies, including liquidated

[58] Tr. 2278, 2308-09.

damages, the Commission should **revise** Joint Applicants' proposed conditions as follows:

- First, before the merger closes, the Commission should require Joint Applicants to publicly file a written list in this docket identifying the 79 performance benchmarks and standards that they will implement in Illinois. This condition would not pose a hardship for Joint Applicants. Indeed, Joint Applicants have already indicated that 36 of the 79 will include those measures/benchmarks proposed at the FCC. Moreover, Joint Applicants' testimony discusses at length the criteria they used for choosing very specific number 79: "The number of measurements was determined based on a determination by SBC/Ameritech as to those measurements that could be implemented in an expedited manner. These measurements are those that directly impact the end-user customer and include the majority recommended by the DOJ."[59] Since Joint Applicants can describe with such particularity the manner in which they picked the number "79," it certainly should not be difficult for them to identify those measures in short order.

- Joint Applicants should also be required to identify the remaining Texas measures/benchmarks (beyond the 79) that they will implement in Illinois prior to merger closing. If Joint Applicants believe that certain of these 122 measures are not technically or economically feasible in Illinois, they should at that time indicate why. This revision will allow the Commission to be aware of what actually is included in Joint Applicants' commitment to implement all of the Texas measures that are technically or economically feasible.

- Since Joint Applicants, by merger closing, would have identified all of the Texas measures they believe they can implement in Illinois, the implementation timetable for those measures should be moved forward. Joint Applicants should begin implementing all Texas performance measures they indicated are feasible in Illinois within 120 days of merger closing and should complete such implementation within 240 days of merger closing.

- The Commission should hold back any opinion concerning whether the benchmarks tied to the Texas measures are appropriate, or whether other measures and benchmarks should be added to that list as result of a collaborative. Similarly, the Commission should refrain from approving the Texas liquidated damages plan without giving parties an adequate opportunity to discuss the specifics of that plan in a collaborative and, if necessary, present evidence to the Commission regarding the flaws of that plan.

[59] SBC/Ameritech Ex. 10.0, p.7.

- The Commission should also indicate that at this time it has not made any determination whether economic feasibility is an appropriate factor in determining whether a specific measure/benchmark should be implemented in Illinois. The Commission should address this issue when faced with a particular factual circumstance.

- Within 90 days of merger closing, Joint Applicants should initiate a collaborative with the Commission Staff, CLECs and other interested parties. The topics to be discussed in that collaborative should include, but not necessarily be limited to: (1) which of the Texas measures and benchmarks are feasible to implement in Illinois; (2) the adoption of performance measures in addition to those Texas measures; (3) the adoption of appropriate benchmarks for the Texas measures, as well as other measures that CLECs may propose in the collaborative; and (4) other issues relating to the appropriate remedies for missed benchmarks/measures.

- At the end of that collaborative, the parties should submit a list of unresolved issues to the Commission. The Commission should then order briefing and/or hearings to be held on these issues with a final Commission decision to follow.

- A further change that needs to be made to the HEPOR is a revision on page 150, paragraph 8. There, the HEPOR reiterates Joint Applicants' commitment to discuss in the collaborative which of the Texas remedies to implement in Illinois. However, as noted elsewhere in the HEPOR, Joint Applicants have now committed that in relation to every Texas measure/benchmark adopted in Illinois, they will implement the corresponding Texas remedy.[60] This enhanced commitment must be contained in the Commission's final order. Accordingly,

AT&T Exception No. 5:

AT&T excepts to the analysis and conclusions and the findings reached in the HEPOR on the issues of performance measures and liquidated damages on the grounds that they are arbitrary, fail to account for the indefiniteness and ambiguity in Joint Applicants' commitments, and are otherwise unsupported by the record, and propose the following modifications to the text on these issues:

[60] Tr. 2292-95.

1. The Commission Analysis and Conclusion section beginning on page 114 of the HEPOR and ending at the top of page 115 of the HEPOR should be **deleted** in its entirety and **replaced** with the following language:

Commission Analysis and Conclusions

Like the OSS commitments, we find Joint Applicants' commitments in regard to performance measures and liquidated damages appallingly vague. What we find most disturbing is that Joint Applicants have left unidentified 43 of the 79 performance measures that they have agreed to import from Texas within 300 days of merger closing. This fact alone makes it impossible for the Commission to determine the benefit of this commitment. We find this lack of information peculiar since Joint Applicants have been able to describe those 79 measures/benchmarks with extreme particularity, even going so far as to claim they will include the "majority" of measurements recommended by the DOJ.

In order to alleviate this concern, as a condition of merger approval, we order that Joint Applicants, before merger closing, shall specify in a public filing in this docket the 79 performance measures and benchmarks that they will implement in Illinois. This is the only way we can actually know what this commitment actual entails. Since Joint Applicants' testimony discusses at length the criteria they used for choosing the very specific number of 79 ("The number of measurements was determined based on a determination by SBC/Ameritech as to those measurements that could be implemented in an expedited manner. These measurements are those that directly impact the end-user customer and include the majority recommended by the DOJ")[61] it should not be difficult for them to identify these 79 measures.

We believe Joint Applicants have also failed to make any concrete commitment to implement any performance measures/benchmarks beyond these undefined 79. Joint Applicants have committed to only implement those Texas measures/benchmarks that are "technically and economically" feasible in Illinois. Unfortunately, Joint Applicants have again failed to conduct any analysis to determine which performance measures/benchmarks are feasible to implement in Illinois. If there is any dispute between Joint Applicants and CLECs regarding whether certain Texas measures/benchmarks are technically feasible in Illinois, like so many of Joint Applicants commitments, the only remedy is open-ended arbitration.

In order to add some certainty and particularity to Joint Applicants' commitment, we require as a condition of merger approval that prior to merger

[61] SBC/Ameritech Ex. 10.0, p.7.

closing, Joint Applicants be required to identify to us in writing (in a publicly filed document in this docket) the remaining Texas measures that they will implement in Illinois. If Joint Applicants believe that certain of these measures are infeasible to implement in Illinois, they should at that time and in that pleading indicate why. At this time we defer any decision concerning whether economic feasibility is an appropriate reason for Joint Applicants' not to implement certain measures. We will make such a decision when faced with specific facts.

Since Joint Applicants must indicate by merger closing all the Texas measures they believe they can implement in Illinois, we believe that Joint Applicants' proposed implementation plan must be revised accordingly. Therefore, consistent with Joint Applicants' other commitments, Joint Applicants should begin implementing all Texas performance measures they believe are feasible in Illinois (as identified in their pre-merger filed writings) within 120 days of merger closing and shall complete such implementation within 240 days of merger closing.

We note that by approving this condition we have in no way decided whether the Texas performance measures, or their related benchmarks, are appropriate. In other words, we have not approved those measures and benchmarks as satisfying any of Joint Applicants' legal requirements or as otherwise appropriate to support competition. Similarly, and for the same reasons, we make no finding regarding whether the Texas liquidated damages plan is similarly appropriate. Many of the parties have pointed out potential flaws in the Texas performance measures and remedy plan. Since we do not believe the current record is complete on these issues, and since these issues can be discussed in the collaborative, we withhold judgment on the appropriateness of the Texas plan. However, we do believe that the Texas performance measures, benchmarks and remedy plans represent a good starting point to an Illinois collaborative regarding performance measures and remedies.

Therefore, we agree with Joint Applicants that within 90 days of merger closing, they should initiate a collaborative with the Commission Staff, CLECs and other interested parties regarding performance measures and remedies. The topics to be discussed in that collaborative should include, but not necessarily be limited to: (1) which of the Texas measures and benchmarks are feasible to implement in Illinois; (2) the adoption of performance measures in addition to those Texas measures; (3) the adoption of appropriate benchmarks for the Texas measures, as well as other measures and benchmarks that CLECs may propose in the collaborative; and (4) other issues relating to the appropriate remedies for missed benchmarks/measures. Once that collaborative has finished, the parties may submit disputed issues to us for final and binding determination.

We find Joint Applicants' commitment additionally vague in that they have failed to give any indication how long these performance

measures/benchmarks and liquidated damages provisions will be available to Illinois CLECs. We find this ambiguity especially troublesome since we view the existence of automatic liquidated damages essential if and when Joint Applicants receive 271 relief. Therefore, we find that the conditions concerning performance measures/benchmarks and liquidated damages have no sunset provisions.

2. The entire Commission Analysis and Conclusion Section starting on page 117 of the HEPOR and ending at the top of page 118 of the HEPOR should be **deleted** and **replaced** with the following language:

Based on the conditions we have imposed in this order, as discussed above, we believe that we have imposed sufficient compliance mechanisms for failure to meet conditions.

3. The entire Commission Analysis and Conclusion Section starting on page 120 of the HEPOR should be **deleted** and **replaced** with the following language:

We refer to our analysis and conclusion concerning question 11 and incorporate our analysis and conclusion on that question here.

4. On page 145 of the HEPOR **replace** section A "OSS Conditions" and section B (page 147) "Additional OSS Commitments," and the language following Commitment 32 (page 147), "Performance Measuring, Benchmarks and Liquidated Damages," which ends at the top of page 151, with the language included in Attachment A to this brief. Because of the length of this section, AT&T's proposed language is set forth in a separate attachment, which also includes AT&T's revisions to Joint Applicants' commitments regarding OSS, performance measures, and liquidated damages.

VI. UNBUNDLING AND WHOLESALE SERVICES

As the Commission is well aware, the UNE Platform is an issue of enormous importance to the future course of local exchange competition. This Commission first ordered the platform long ago in granting the petition of LDDS Communications, Inc. in

the Wholesale/Platform Case, Docket No. 95-0458/0513 (consol.)(June 26, 1996). The unbundled switch platform can serve as the basis for broad-scale local service competition to residence and small business customers.[62] The incumbents are well aware of the procompetitive potential of the UNE Platform as well, and recognizing its importance to the competitive efforts of CLECs they (and Ameritech, in particular) have waged an exhaustive campaign to defeat it or limit its effectiveness.

The treatment of this issue by the HEPOR thus warrants close attention. The only direct discussion appears in connection with issue 7 ("Unbundling and Wholesale Services"):

> Joint Applicants have explained their commitment to provide pre-existing combinations of UNEs, with no "glue charge," subject to the outcome of the FCC's UNE Remand Proceeding, and their FCC commitment to make the UNE platform available for residential customers, subject to certain conditions. We find this approach to be acceptable. HEPOR, p. 78.

Embedded in the first sentence are conditions and limitations that would gut the effectiveness of Joint Applicants' ostensible "commitment" to provide UNE combinations, however. They are restrictions and limitations that are contrary to this Commission's policy supporting the UNE Platform. And, remarkably, they are conditions and limitations that were not even mentioned in Joint Applicant's prefiled testimony in this case.

The restrictions come from the Proposed FCC Conditions, which as the Commission will recall Joint Applicants did not even want to have made a part of the record. The first restriction, as noted in the HEPOR, is that UNE combinations would be

[62] It can also be the basis for wholesale markets for local service, as CLECs acquire UNEs from the incumbent, combine them with their own facilities, adding features and functionality, and resell the combination to other CLECs for use in serving *their* customers.

limited to service of residential customers.[63] Moreover, the Proposed FCC Conditions include state-specific caps on the numbers UNE-Ps that SBC/Ameritech would have to make available; for Illinois, there is a ceiling of 302,000 on the total number of customers that can be served via a combination of resale and UNE-P Finally, this "promotional" offering is to be made available for limited period of time.[64]

It is worthy of note, first of all, that although Mr. Kahan and Mr. Appenzeller and Mr. Hopfinger all testified concerning the "commitment" to make UNEs and UNE combinations available, not one mention is made in their testimony of either the residential limitation or the cap. At the hearings, Mr. Kahan testified repeatedly that there was not a ceiling on the total number of UNE combinations to be made available before finally correcting himself on redirect.[65] One wonders what other hidden exceptions or qualifications Joint Applicants will conjure up if their proposal and their proposed language is approved.

Moreover, and importantly, these restrictions are contrary to this Commission's orders approving and requiring that the platform be made available. In both the Wholesale/Platform Order and the TELRIC order, not to mention the AT&T arbitration proceeding, the Commission has required "end-to-end" combinations of UNEs to be made available, without restricting it to residential customers, and without numerical limitations. The UNE Platform is essential to development of mass market or residential

[63] The Proposed FCC Conditions have elaborate provisions to audit and insure "compliance" with the residential and other restrictions by CLECs. See Proposed FCC Conditions, SBC/Ameritech Ex. 1.5 (Kahan Reopen Reb., Schedule 1), Sec. XI., para. 46(e).

[64] Id., paras. 43-44.

[65] See AT&T Brief on Reopening at 9-11.

competition, but small business and higher-end residential markets certainly overlap--all the more so with increasing numbers of persons working at home in "virtual offices." There is no policy reason whatsoever for precluding the use of UNEs to serve small business customers, and certainly on this record Joint Applicants have not attempted to justify such a restriction; rather, they have tried to hide it. And of course there is no policy basis for limiting the number in any fashion. Joint Applicants are simply trying to restrict the level of UNE based competition.[66] The Commission must not allow itself to be drawn into this unambiguously anticompetitive set of limitations.

Additionally, as with the shared transport discussion, the HEPOR erroneously finds a "procompetitive benefit" to Joint Applicants' commitment to abide by the "status quo" under their interconnection agreements, pending the FCC's decision in the UNE remand proceeding. But those "commitments" were made quite apart from this merger and they are in no way attributable to this merger. To find, as does the HEPOR, that these commitments "represent a procompetitive benefit to Illinois CLECs and end-users that would not be available absent the merger" is simply wrong.

Finally, although Joint Applicants refer to a "commitment" to provide pre-existing combinations of UNEs, and the HEPOR repeats that reference in the "Commission Analysis and Conclusions" section at p. 78, the actual "Conditions" portion of the HEPOR does not include any commitment on the provision of UNE combinations. This is a glaring and important omission which must be remedied. Accordingly,

[66] The cap for Illinois is placed in context by noting that Ameritech Illinois *added* nearly 500,000 access lines in 1998. See Ameritech Annual Report, 1998, p. 22.

AT&T Exception No. 6:

AT&T excepts to the HEPOR's treatment of the provision of UNE combinations as arbitrary, unsupported in the record and contrary to prior Commission orders, and proposes the following textual modifications:

1. **Revise** first full paragraph on p. 78 to read as follows:

> One issue which generated comment concerns the so-called UNE Platform. Joint Applicants have explained their commitment to provide pre-existing combinations of UNEs**,** with no "glue charge," subject to the outcome of the FCC's UNE Remand Proceeding~~. and their FCC commitment to make the UNE platform available for residential customers, subject to certain conditions.~~ We find this approach to be acceptable. ~~As explained with respect to shared transport under question 3, above,~~ Joint Applicants will not be required to forfeit in this proceeding any legal rights that they may have when the FCC issues its decision in the UNE Remand Proceeding~~.~~, but neither will this Commission prejudge the scope and effect of a future FCC order. In the meantime, however, Joint Applicants have committed to provide shared transport and to also abide by the "status quo" under their interconnection agreements. , even though one could argue that the Supreme Court's vacatur of FCC rule 319 relieves them of any obligation to do so. ~~We therefore find that Joint Applicants' commitments represent a procompetitive benefit to Illinois CLECs and end-users that would not be available absent the merger.~~ We note, however, that Joint Applicants' agreement to maintain the status quo was made without regard to the current merger proposal.

2. **Add** the following additional "commitment" paragraph after "(30) Shared Transport" (and renumber accordingly):

> (31) Offering of UNEs
>
> SBC/Ameritech shall provide each of the UNEs defined in the FCC's Local Competition Order and Third Order on Reconsideration. All such UNEs shall be available both individually and combined, at the interim rates (including the rates for loops, shared transport and local switching) determined in the Commission's TELRIC proceeding and subject to further proceedings in that docket, for use in providing any telecommunication service, including exchange service, exchange access service and interexchange service. This section shall be effective, with respect to a particular network element, pending a final order by the FCC (including all rehearings and appeals) on remand from AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721(1999) regarding the availability of that element as an UNE.

VII. NATIONAL LOCAL SUBSIDIARY

The Commission in re-opening this proceeding asked fundamental questions about the relationship between Ameritech Illinois, SBC's incumbent LEC if this merger is permitted, and the National Local Subsidiary ("NatLoCo"), SBC's national CLEC in its pursuit of out-of region local entry.[67] As shown previously, Joint Applicants have succeeded to a remarkable degree in obscuring this relationship, and their case on re-opening only added to the confusion and heightened the concern over the effect of their NatLoCo plans on competition. The HEPOR not only accepts Joint Applicants' position on this issue, it adopts their proposed discussion word-for-word. As a consequence, the Commission has not gotten a forthright answer to its question, and the Proposed Order itself is self-contradictory and non-responsive to the Commission's concerns.

As summarized in the HEPOR, Joint Applicants current account seems to be that the National-Local subsidiary will not operate "directly" in Illinois, at least at the outset, but rather that Ameritech Illinois will "cooperate" with NatLoCo in the same manner that ILECs cooperate with companies like AT&T to provision multi-state contracts.[68] Under this scenario NatLoCo would subcontract with Ameritech Illinois, with AI providing the in-region local service portion of the national package or bundle of services. NatLoCo would not need Illinois certification, according to Joint Applicants, because the service will be provided by Ameritech. And dealings between the two entities will be governed by federal and state affiliate transaction rules.

As a threshold matter, the assertion that Ameritech Illinois will only "cooperate" with NatLoCo in the same manner that it "cooperates" with companies like AT&T and

[67] *See* AT&T's Initial Brief on Reopening at 61-62.

MCIWorldCom in certain national procurement arrangements is inherently incredible. The entire logic of the national local strategy as articulated by SBC in this case is to leverage the existing base of in-region large business customers and offer them packages or bundles of service nationwide; that is a very different kind of arrangement than the model they have described in which the ILEC participates in a bid responding to a FRP. Rather, the very nature of the national-local strategy implies that Ameritech Illinois (the self-described "subcontractor" in this arrangement), will be furnishing an expansive range of services to NatLoCo in support of the effort—a fact that Joint Applicants do not deny but about which they have refused to provide any facts whatsoever.[69] But what has emerged only reluctantly and through repeated questioning is that Joint Applicants will NOT treat NatLoCo like other CLECs; Ameritech Illinois' "cooperation" with NatLoCo will not be extended to others.[70] Thus, the Commission has the "bottom line" answer to its question, but otherwise it remains almost completely in the dark.[71]

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[68] HEPOR at 87.

[69] As shown in AT&T's Initial Brief on Reopening, that raises the question of what NatLoCo would pay for these services furnished by Ameritech Illinois. Again, the answers were unsatisfactory. Joint Applicants indicate only that the relationship between Ameritech Illinois and NatLoCo will be controlled by federal and state affiliate transaction and cost allocation rules. But affiliate transaction rules govern transfers of assets between regulated and unregulated affiliates, and if that is SBC's intent it has not disclosed that fact here. Similarly cost allocation rules have no effect if the affiliate(s) in question are subject to earnings regulation, as opposed to the kind of price cap regulation to which Ameritech Illinois is subject.

[70] *See, e.g.,* AT&T Initial Brief on Reopening at 63-65.

[71] The internal inconsistencies in Joint Applicants' positions are reflected throughout the HEPOR. For example, in responding to AT&T's suggestion that it would be improper for NatLoCo to engage in joint marketing with Ameritech Illinois, the Joint Applicants point to Section 272 of TA96 saying that provision allows a Bell Operating Company to use a separate affiliate to market the incumbent affiliate's local exchange services if the BOC gives other carriers the same opportunity. But in discovery in this case Joint Applicants acknowledged that they would engage in such joint marketing, and simultaneously stated that they would *not* market for AT&T or other competing CLECs. See Response to AT&T Data Request R 1-19(c) (Supplement), Attachment 1.2.2 to Gillan Direct on Reopening (AT&T Ex. 1.2).

SBC has an answer to the problem of Ameritech Illinois treating NatLoCo like any other CLEC, and the HEPOR accepts that answer unquestioningly: NatLoCo just won't become a CLEC. NatLoCo won't come into Illinois directly as a CLEC, because it will be here indirectly through its "agent" or "subcontractor," Ameritech Illinois. By that logic, presumably SBC wouldn't care if NatLoCo *ever* entered Illinois overtly, in that it would gain every preference it wishes by being the invisible "principal" contractor behind its "sub," Ameritech Illinois. In other words, SBC's "answer" to the Commission's concern that Ameritech Illinois would *favor* the National-Local Subsidiary is an unambiguous yes, but that the Commission need not worry because it would favor NatLoCo as a "partner" and not as a "CLEC." That is not an answer from which the Commission should take any comfort, however.

Finally, as the HEPOR indicates in its summary, AT&T had recommended that NatLoCo be precluded from reselling Ameritech Illinois services and from including any Ameritech Illinois services in its national bundles. Rather, NatLoCo should be limited to services and facilities that are available to any other CLEC (and priced at rates based on economic costs). The HEPOR (actually, SBC, through its proposed language) disposes of this recommendation as follows:

> We reject AT&T's request to require the National-Local Subsidiary to operate as a CLEC right away. We also see no danger of the Subsidiary being granted excessive discounts, as it will purchase services directly from Ameritech Illinois' tariffs.[72]

At best this is giving remarkably short shrift to the discussion, summarized elsewhere, as to why resale is *inherently* discriminatory – it necessarily favors an ILEC affiliate such as

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[72] HEPOR at 95.

NatLoCo. Because these companies – Ameritech Illinois and NatLoCo – have the same stockholder, the *price* that NatLoCo pays to Ameritech is irrelevant; all that matters is the *cost* that Ameritech incurs. The Commission need not take AT&T's word on this, however. SBC's own witness, Mr. Kahan, in testified that "[u]nlike their competitors," Joint Applicants "will ultimately view the economic return on serving these [high volume, high revenue customers on a *consolidated* basis."[73] And that is the reason NatLoCo should be permitted only to by services/facilities that are available to any other CLEC and that are priced based on economic cost. Accordingly,

AT&T Exception No. 7:

AT&T excepts to the Commission Analysis and Conclusions with respect to the National-Local Subsidiary on the grounds that they are arbitrary and capricious and not supported by the record, and requests the following modifications to the HEPOR:

1. **Delete** the two paragraphs appearing at the top of p. 95 and **replace** with the following:

"Commission Analysis and Conclusion

The National Local Subsidiary ("NatLoCo") and its relationship to Ameritech in Illinois raise substantial competitive concerns. The intent of the Telecommunications Act and of the Illinois Public Utility Act is to require that incumbent local exchange carriers such as Ameritech-Illinois provide other competitive carriers the opportunity to use the exchange network on an arms-length, nondiscriminatory basis. Accordingly, on re-opening the Joint Applicants were asked to address issues concerning the relationship between the incumbent Illinois LEC and NatLoCo, and "whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with Ameritech-Illinois."

The response of Joint Applicants is lacking in specifics, but on the information provided it appears that the Joint Applicants envision an arrangement whereby Ameritech Illinois would offer and provide local service in Illinois, while NatLoCo would have some role in "coordinating" the services of SBC's ILEC affiliates so as to give the impression of a single national provider. It

[73] SBC/Ameritech Exhibit 1.3, Direct Testimony on Reopening of James Kahan, p. 20 (emphasis supplied).

appears, in other words, that Ameritech-Illinois would become the Illinois arm of SBC's National Local Strategy. Consequently, although NatLoCo would not have any formal legal standing or presence in Illinois, at least initially, it would nevertheless in effect be competing in Illinois through the efforts of Ameritech Illinois.

It now appears, moreover, that Joint Applicants do not intend for Ameritech Illinois to treat NatLoCo like any other CLEC. Instead, NatLoCo will work "cooperatively" with Ameritech-Illinois in some manner that Joint Applicants have declined to describe. Joint Applicants have made clear, however, that services/facilities provided by Ameritech-Illinois to NatLoCo would not be available to other CLECs in *any* manner.

Ameritech-Illinois' intention to provide some undisclosed mix of services/facilities/marketing to NatLoCo that it will not make available to other CLECs, raises the further issue as to what NatLoCo will *pay* Ameritech-Illinois for these services/functions. Joint Applicants state only that such dealings will be controlled by federal and state affiliate transaction and cost allocation rules. But affiliate transaction rules govern transfers of assets between regulated and unregulated affiliates, and we do not understand Joint Applicants to be saying that assets will be transferred from Ameritech Illinois to NatLoCo. And there is no reason to expect that *any* form of cost-allocation can prevent competitors from being disadvantaged by NatLoCo's special relationship with Ameritech Illinois.

Competition would be harmed if SBC is allowed to bundle monopoly and competitive services across a vast post-merger footprint – a footprint that no other carrier can come close to replicating. Whether the harm is achieved by *bundling* NatLoCo's services with those of Ameritech-Illinois, or by NatLoCo *reselling* the same Ameritech-Illinois service, the result would be to unfairly disadvantage of competitors that have no base of incumbent customers to leverage.

In these circumstances the National-Local subsidiary should be precluded from including, in any national bundle, any service offered by Ameritech-Illinois. Ameritech-Illinois should be required to treat NatLoCo like other CLECs, i.e., NatLoCo should be required to offer services in Illinois as a separate entity and subject to rules which recognize the unique problems that arise when a CLEC is a wholly-owned affiliate of an ILEC. Accordingly, NatLoCo should be permitted to buy from Ameritech-Illinois *only* those services/facilities that are: (1) available to any other CLEC, and (2) are priced at rates based on economic cost. Among other benefits, these conditions would have the consequence of prohibiting NatLoCo from simply "reselling" Ameritech-Illinois' services, because service-resale is *inherently* discriminatory and favors an affiliate of an ILEC such as NatLoCo.

2. Condition (21) (at p. 136) of the HEPOR should be **modified** as follows:

"(20) National-Local Subsidiary – ~~Joint Applicants will not seek local exchange certification for their National-Local Subsidiary in Illinois prior to January 1, 2003;~~ The National-Local Subsidiary shall not be permitted to resell any Ameritech Illinois services or otherwise include any service offered by Ameritech Illinois in any national bundle of services that it may offer. The National-Local subsidiary shall be permitted to provide service to customers in Illinois only via Ameritech Illinois facilities/services that are (1) available to any other CLEC on the same basis, and (2) that are priced based on economic cost.

VIII. PROPOSED FCC CONDITIONS

As noted previously, Joint Applicants have taken opportunistic positions with respect to the conditions they have proposed to the FCC in connection with its merger approval proceeding. Initially, Joint Applicants refused to reopen the record, a tactic that would have prevented any examination of the Proposed FCC Conditions. The manner in which the Proposed FCC Conditions were finally presented was equally dubious. The HEPOR states: "This list of [proposed FCC] conditions was made an exhibit to Mr. Kahan's Rebuttal Testimony on Reopening. The Chairman then sent . . . ('July 9 letter')."[74] This timing is incorrect and leaves out important details. The Proposed FCC Conditions were filed *at the FCC* on July 1, 1999. Initially, they were not filed at the Illinois Commerce Commission. On July 2, 1999, several Intervenors filed a Joint Motion requesting that Joint Applicants file their Proposed FCC Conditions with the ICC and that Intervenors be given an opportunity to conduct discovery and file testimony on the federal proposal. Joint Applicants refused to file their proposed federal conditions with the ICC and opposed the Joint Motion in their July 6 brief. The Commission denied the Joint Motion on July 8. In lieu of filing the Proposed FCC Conditions, the Commission ordered that they be the subject of cross-examination. The next day, July 9,

[74] HEPOR at 5.

Joint Applicants *filed* the Proposed FCC Conditions, despite the Commission's Order to the contrary. Thus, Joint Applicants successfully stalled filing their Proposed FCC Conditions until after Staff and Intervenors filed their final round of testimony (and after discovery was concluded). AT&T and MCI objected to the admission of the Proposed FCC Conditions into evidence at the first day of the evidentiary hearing, July 13, but the objections were overruled.[75] Although they adhered to the position that the Proposed FCC Conditions were separate and distinct and need not be relied upon in this docket, their counsel repeatedly conducted cross examination on the "benefits" of those conditions.[76] And finally, while at last acknowledging what they previously denied -- that the FCC conditions as finally adopted will apply in Illinois--they persist in saying that Illinois will have the "best of both worlds."[77]

The Proposed Order passes on all of this in three sentences (taken directly from Joint Applicants' proposed order). It states:

> While we recognize the Joint Applicants' willingness to abide by the substantive provisions of their proposed FCC commitments in Illinois, we do not find it necessary to impose such requirements as conditions of this Order. There is no guarantee that the FCC will adopt all of the conditions as proposed. We will simply take note of the FCC conditions and the Joint Applicants' assurance that those conditions, if adopted, will apply in Illinois and will be treated as incremental to the Illinois conditions.

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[75] Tr. at 1843-46.

[76] Tr. at 2654-56, 2746, 2755-56, 2828-33.

[77] Joint Applicants' other questionable tactics should be explicitly addressed. The HEPOR does not mention that Joint Applicants initially refused to move to reopen the record. HEPOR at 4. The HEPOR also fails to address the fact that Joint Applicants asked for and received an expedited schedule, even though the fault for any delay rests with Joint Applicants. *Id.* Finally, mention of the truncated briefing schedule should also be made. Pursuant to the Hearing Examiners' June 21 order, no reply briefs or replies to exceptions were filed.

On its face, this treatment of the FCC conditions is unexceptionable. As we have seen elsewhere, however, when it serves their interests Joint Applicants treat the FCC conditions not as *incremental* but as a limitation or restriction on their Illinois undertakings. This is particularly true of the "UNE combinations" commitment, where they now acknowledge that the FCC limitations as to residential customers and a ceiling or cap on the total number of customers served in this manner will apply. Accordingly, language should be added to the Proposed Order making it absolutely clear that Illinois commitments will apply in full and as stated, and that no limitations, exclusions or exceptions contained in whatever FCC conditions may finally be adopted will apply in Illinois. Accordingly:

AT&T Exception No. 8:

AT&T excepts to the "Commission Analysis and Conclusion" with respect to the Proposed FCC Conditions on p. 131 of the HEPOR on the grounds that, read in conjunction with other portions of the HEPOR, it is not clear and definite as to the effect of the such conditions as may be adopted by the FCC on the Illinois commitments. AT&T requests that the following sentence be **added** at the end of the paragraph:

> "No limitations, exceptions, exclusions or other conditions that may be adopted as a part of FCC conditions imposed on the merger will restrict the nature or scope of any commitment or condition adopted by this condition."

IX. CONDITIONS TO APPROVAL OF THE REORGANIZATION – LRSIC and TELRIC

AT&T has no objection to Ameritech filing revised cost studies. However, it is absolutely crucial that these cost studies not be used as an excuse to delay other dockets. The HEPO states: "The Commission will utilize the updated studies in its analysis of the

Company's request for rate rebalancing and in the two TELRIC investigations."[78] This language was also included in the Post Exceptions Proposed Order from the first phase of this proceeding.[79] Since the Phase I PEPO was issued, Ameritech has used this issue to delay the TELRIC II proceeding. The TELRIC II proceeding was initiated to determine, among other things, nonrecurring charges for shared transport. As the Commission is well aware by now, Ameritech is not interested in providing shared transport to CLECs any time soon. One avenue of delay is for Ameritech to stall on pricing. That is precisely what it is attempting to do here.

The first TELRIC docket was initiated in August 1996. Three years later, CLECs *still* do not have prices for shared transport or the UNE-Platform.[80] The current TELRIC docket was initiated in June 1998. After the Phase I PEPO in this docket came out, Ameritech moved for a general continuance of the TELRIC II docket, using the updated cost studies provision contained in the merger PEPO as a justification.[81]

The new TELRIC studies will have little or no bearing on TELRIC prices for shared transport. TELRIC is a forward-looking cost methodology, based on the most efficient network. The merger may impact actual, historical costs, but it should not affect the forward-looking TELRIC costs. Thus, there is no need for Ameritech to update its TELRIC studies, as the merger will have no impact on the TELRIC calculations.

If the Commission believes it necessary for Ameritech to update its cost studies, it should make clear that *no* dockets are to be delayed while Ameritech prepares the

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[78] HEPOR at 135.

[79] PEPO (Phase 1) at 96 (Apr. 26, 1999).

[80] Tr. at 2074, 2076-77, 2125-28 (Gebhardt).

updates. AT&T predicts that removing the delay incentive will cause Ameritech to rethink the "need" to update its cost studies. In any event, and as a further incentive, the Commission should order interim prices. In particular, the Commission should order that the prices for the loop, switch and shared transport established in TELRIC I (ICC Docket Nos. 96-0486/0569 (consol.)) are to remain in effect until final prices are established. Furthermore, the Commission should reject Ameritech's argument that prices established for shared transport in TELRIC I are no longer valid because Ameritech now intends to implement a different version of shared transport. This argument just perpetuates Ameritech's shell game on shared transport, and on this issue in particular the Commission should declare that "enough is enough."

AT&T Exception No. 9:

AT&T takes exception to the condition requiring Ameritech to file updated cost studies on the grounds that these studies are unnecessary, not supported by the record and will serve only to delay important, market-opening proceedings. AT&T requests that the entire condition regarding updated cost studies be stricken. In the event the Commission believes it is necessary for Ameritech to file updated cost studies, AT&T proposes the following modifications to the text on this issue:

1. The conditions language on page 135, paragraph 12 of the HEPOR should be modified as follows:

> (12) LRSIC & TELRIC – AI will file revised LRSIC, TELRIC and shared and common cost studies within six months after the last regulatory approval of the proposed reorganization. It is noted that Staff is willing to work with AI to establish a priorities list for such updates. The Commission will utilize the updated studies in its analysis of the Company's request for rate rebalancing and in the two TELRIC investigations. The updated cost studies may not be used to relitigate prices that have already been established. The updated cost studies should only be filed if they reflect

[81] Ameritech Motion for General Continuance ¶ 4, ICC Docket No. 98-0396 (May 3, 1999).

lower costs due to merger synergies and savings. Cost studies purporting to show higher costs due to the merger will not be permitted. No dockets shall be delayed as a result of this condition.

CONCLUSION

The Commission is faced with a difficult set of choices. The above discussion demonstrates that the HEPOR is hopelessly flawed, and that in the end is because the merger proposal – even with its layers of convoluted conditions, is flawed. Joint Applicants in the main case tried to show that the merger is not anticompetitive, and they failed. They tried to fix the merger with conditions and failed. The Commission gave them another chance and they failed again. Various Intervenors have tried to fix the conditions (including those which address the competitive problems), but to no avail.

AT&T in these exceptions has attempted to make suggestions that would address some of the more glaring deficiencies of the Proposed Order, but in the end no amount of fiddling with the language of the conditions is going to cure the fundamental flaws of this merger. If the Commission is determined to promote local competition, rather than trying to fix the proposed conditions it should reject the merger – and more. Instead of approving the merger in return for Ameritech agreeing to abide by the law, the Commission should proceed to force Ameritech to comply with its already-existing legal obligation to open its markets. Specifically, the Commission should compel Ameritech to:

- implement the interim and long-term versions of shared transport (now that its claims of technical unfeasibility have been exposed as false), pursuant to the Commission's order in Docket No. 96-0486/0569 consol. and its interconnection agreements with AT&T and others;

- make the UNE-Platform available immediately, pursuant to the Commission's order in Docket No. 95-0458/0531 consol.;

- offer the prices established in the TELRIC I docket (96-0486/0569 consol.) as interim prices for shared transport, the loop, switch and other UNEs, and for the UNE-Platform;

- implement 79 of the 122 performance measurements from Texas, pursuant to its TA96 Section 251 obligations, and in conjunction with the Illinois Code Part 790 Performance Measurements docket;

- make available a list of UNEs, services, facilities and interconnection arrangements from other states that it will import into Illinois *automatically*, pursuant to its Section 251 obligation to negotiate interconnection agreements;

- engage in an OSS collaborative, pursuant to its Section 251 obligation to open its markets to competition.

Finally, the Commission should welcome SBC as a local exchange competitor in Illinois. By taking these steps, the Commission will signal to consumers, business customers, ILECs, CLECs, and other regulatory agencies that Illinois is serious about opening its local exchange markets to competition. As the steps above highlight, it is not necessary to approve this merger to foster local competition in Illinois. To the contrary, approving the merger will have anticompetitive effects for all the reasons identified throughout this proceeding by AT&T, Staff, all public and consumer groups and CLECs.

Respectfully submitted,

Dated: August 17, 1999 AT&T COMMUNICATIONS OF ILLINOIS, INC.

By:_____

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